Jurisdictional Statement

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

City of Lockhart,
Appellant

v.

United States of America
and
Alfred Cano,
Appellees

On Appeal From the United States District Court of the District of Columbia

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JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

City of Lockhart,

Appellant

v.

United States of America
and
Alfred Cano,

Appellees

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

1. Whether the district court improperly denied preclearance under §5 of the Voting Rights Act in finding that the provision in a home rule charter adopted by the citizens of Lockhart, Texas, which retained a half-century-old election feature using numbered places for election of councilmen would have the effect of abridging the right to vote on account of race, color, or membership in a language minority group.

2. Whether the district court improperly denied preclearance under §5 of the Voting Rights Act of that portion of a home rule charter which created "off-

year" elections for newly-created places on an enlarged city council.

3. Whether the district court improperly denied preclearance to the entire home rule charter when it found the numbered place and staggered term features of the charter to be objectionable under the Voting Rights Act.

LIST OF PARTIES INVOLVED

The caption of the case in this Court contains the names of all parties involved in this proceeding.

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OPINION BELOW

The opinion by the lower court remains unreported. The lower court's Memorandum Opinion and Order Denying Declaratory Judgment are appended hereto.

STATEMENT OF JURISDICTIONAL GROUNDS

Appellant, the City of Lockhart, brings this appeal from a Judgment of the United States District Court for the District of Columbia denying Appellant's request for a declaratory judgment that the adoption of a city charter by the City of Lockhart and the enlargement of the city council which accompanied such adoption do not violate §5 of the Voting Rights Act of 1965, 79 Stat. 439 (1965) as amended 89 Stat. 402, 42 U.S.C. §1973c (Supp. 1981). The Judgment was entered on July 30, 1981, by the United States District Court for the District of Columbia, sitting as a three-judge court under the requirements of said statute. On September 22, 1981, Appellant filed in that court a Notice of Appeal, a copy of which is appended hereto. (See Appendix p. 39a) Jurisdiction is vested in this Court under the Voting Rights Act of 1965, 42 U.S.C. §1973c (Supp. 1981)

Appellant submits that this Court has jurisdiction over the questions on appeal since said statute provides for a direct appeal to this Court. The questions on appeal are of such a substantial nature as to require plenary consideration by this Court.

STATUTORY AUTHORITIES

Voting Rights Act. 42 U.S.C. §1973c (1975):

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after

such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

STATEMENT OF THE CASE

A. Facts Material to Case

The City of Lockhart is a city of approximately 7,500 persons located in Caldwell County, Texas. In 1970, the population was 6,489, of whom 45% were Anglo, 41% were Mexican-American, and 14% were Black. Prior to February 20, 1973, the City of Lockhart was governed by a city commission, a form of government authorized by the general laws of Texas. As a "general law" city, Lockhart elected a mayor and two city commissioners for two-year terms every even-numbered year. The mayor and city commissioners were elected by designated places (the numbered place system) by a plurality vote. Numbered places for elections to the office of city commissioner had been utilized, without question, challenge or objection, since at least 1917.

In July, 1972, the City Commission appointed a Charter Study Committee composed of 15 persons, who were charged with the task of studying the desirability of adopting a home rule charter. This 15-member Charter Study Committee was composed of 9 Anglos, 4 Mexican-Americans, and 2 Blacks. The Charter Study Committee recommended that a Charter Commission be formed to draft a home rule charter for the City of Lockhart. Thereafter, in September, 1972, the citizens of Lockhart approved the creation of a Charter Commission and elected the same 15 members to serve as "Charter Commissioners."

Among the many recommendations the Charter Commission made in the proposed charter were two basic changes for elections in Lockhart. First, the pro-

posed charter provided for expansion of the size of the governing body from three (mayor plus two commissioners) to five (major plus four councilmen). Second, it provided for election of the two new council positions in odd-numbered years. As before, the mayor and council two places (one and two) were filled in elections held in even-numbered years; the two new places (three and four) were filled in "off-year" elections. Thus, the two new places filled in off-year elections created "staggered terms" in the new city council. The charter retained the pre-charter plurality vote feature.

This proposed home rule charter was unanimously endorsed by the members of the City Commission and proposed, without change, to the voters of Lockhart. In February, 1973, a special charter election was held in which the charter was adopted by the citizens of Lockhart by a vote of 309 to 40.

The mayor and councilmen for places one and two, who had been elected in 1972, continued to serve until 1974. The first election to fill the new positions (places three and four) was held later in 1973. Elections were held annually thereafter until 1979.

In 1979, an action was filed against the City of Lockhart in the Western District of Texas, Austin Division, seeking to enjoin the city from utilizing the election system established by the home rule charter until such charter received "preclearance" in accordance with §5 of the Voting Rights Act.[1] The District

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[1] Prior to 1975 Texas and its political subdivisions were not subject to the Voting Rights Act. When enacted, the 1975

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Court granted the injunctive relief sought. *Cano v. Chesser*, A-79-CA-032 (W.D. Tex. March 2, 1979).[2] The city thereafter submitted the home rule charter to the Attorney General for §5 review. At that time the Attorney General did not object to the charter or the city's home rule status, but did object to the numbered place and staggered term provisions.[3] The city therefore brought this action for declaratory relief as to those features.

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Amendments applied retroactively to any changes instituted after November 1, 1972. Thus, adoption of the charter in 1973 fell within the time frame contemplated by the 1975 Amendments. 42 U.S.C. §1973c, 89 Stat. 402, 404 (August 6, 1975).

[2] The language of the temporary restraining order, moreover, precluded elections under either the pre-charter system or the charter system, since it also found the retention of numbered places to be a "major change" of the charter. The city elected to seek preclearance of the charter election system rather than to appeal the restraining order, since an appeal could have resulted, at best, in a return to the pre-charter system. No elections have been held since the restraining order was entered.

[3] Unlike the situation in the *City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980), the Attorney General has not at any point offered to preclear any technical amendments to the city charter which would allow elections under the pre-existing voting system. c.f. *City of Rome, supra*, where the Attorney General offered to preclear amendments allowing return to the old system. 446 U.S. at 183; 100 S.Ct. at 1565, 64 L.Ed.2d at 143. Thus, the impact of the court's order was to effectively preclude elections under either the new system or the old system. See note 2, *supra*.

B. Opinion of Lower Court

The three-judge court limited consideration to the question of whether adoption of the home rule charter had a discriminatory "effect," reserving until a later time the question of "purpose," should it be necessary to reach such issue. Majority Opinion p. 1, *City of Lockhart v. United States*, No. 80-364 (D.D.C. July 31, 1981) (Appendix p. 2a). On the question before it —discriminatory effect—the court was divided. The majority held that adoption of the home rule charter had a negative impact on minority voting strength and would relegate the city to its pre-charter general law status. It also found the numbered places and staggered terms to be changes with discriminatory impact. Chief Judge Spottsword W. Robinson, III, in dissent, limited his inquiry to the aspects of the home rule charter that related to actual voting practices, found that the numbered place feature was not a "change" within the ambit of §5, that staggered terms had no negative effect on the right to vote under the circumstances of their origin in Lockhart, and would have ordered further hearings as to whether the numbered places and the staggered term features were enacted with discriminatory purpose.

The majority first determined that numbered places, although used without challenge for more than 50 years, were illegal in a general law city in Texas.[4]

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[4] Appellant vigorously disputes the lower court's legal conclusion that the use of numbered places in a general law city was illegal. Even the expert on Texas municipal law called to testify on behalf of the United States conceded that the general laws of Texas do not say *how* the two commissioners

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It then proceeded to measure the charter election system, not against the pre-charter system actually in use, but against the pre-charter system it felt *should have* been used. A "change" to numbered places from the "pure" at-large system it thus posited had discriminatory effect. The court distinguished *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), since the use of numbered places in the two at-large council positions in the City of New Orleans was no "illegal" prior to adoption of the New Orleans redistricting plans.[5]

This approach required the majority to deal with principles laid down by the Supreme Court in *Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971), where the court had required comparison between the system actually in use, rather than one which "should have been used" in accordance with state law. The only reason given for its failure to consider the pre-charter system using numbered places was that to do so would allow the city to somehow "legitimatize . . . illegal activities in the past." Majority Opinion p. 10, *City of Lockhart v. United States*, No. 80-364 (D.D.C. July 31, 1981) (See Appendix p. 13a-14a).

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are to be elected. But even if numbered places were illegal before the Charter, it is incorrect to treat the numbered place feature as if it did not exist. See Dissenting Opin., p. 11, *City of Lockhart v. United States*, No. 80-364, (D.D.C. July 31, 1981) (Appendix p. 31a).

[5] The facts and holdings of the Supreme Court in *Beer v. United States* are discussed more fully in the text accompanying note 7, *infra*. Unless stated otherwise, all references to *Beer* refer to the Supreme Court opinion.

As to the additional election created by the two new council positions, the majority held that, in combination with the numbered places, there was a "synergistic discriminatory effect" which "allowed numbered places to affect . . . twice as many elections for a larger number of elections." Majority Opinion p. 10, *City of Lockhart v. United States, supra* (Appendix p. 14a). Without explaining why, the majority concluded that even if numbered places were valid, an additional off-year election for new numbered places somehow placed minority voters in a worse position than before.

Finally, the majority concluded that the "governance and election plan" of Lockhart could not be given preclearance. It went beyond the mere election features presented by Lockhart in its application for declaratory judgment, and stated that Lockhart is now a "general law" city. This ruling went beyond even the Intervenor's greatest prayer for relief.[6] The court simply does not explain why Lockhart must revert to general law status.

Chief Judge Robinson dissented from all the major holdings of the court. Looking to the legislative history of the Voting Rights Act and its interpretation by the

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[6] Although not presented in its pleadings, during argument at trial the Attorney General argued that if preclearance of the election features were denied, Lockhart would revert to its status as a general law city, under a commission form of government. This view apparently was adopted by the majority for they refuse to approve the "*governance* and election plan" [See, e.g. Paragraphs 12 and 14, Majority Opinion p. 12, *City of Lockhart v. United States*, No. 80-364 (D.D.C. July 31, 1981) (Appendix p. 16a)] and state that Lockhart is now a "general law" city. Majority Opinion p. 1, *City of Lockhart v. United States, supra* (Appendix p. 2a).

United States Supreme Court in *Beer v. United States*, *supra*, he concluded that the purpose of §5 was to prevent erosion of minority voting power. Concluding that bloc voting did exist in Lockhart, and acknowledging that the use of numbered posts and staggered terms may tend to diminish the political effectiveness of minorities, he nevertheless limited the inquiry, in accordance with *Beer*, to whether changes were actually "retrogressive." With respect to the use of numbered places, he refused to reach the issue of prior "illegality" under Texas law. Focusing on the voting system that was actually in use for the prior half century, he found there was no "change" in retaining the numbered place feature in the charter. He read *Perkins v. Matthews*, *supra*, to mean that the inquiry is limited to the system actually used "in fact." Numbered places, which existed before and after the charter was adopted, were not a change in the voting system triggering §5 review.

In analyzing staggered terms, he noted that such could not be considered without examining the expanded size of the council. Increased size in no way diminished minority voting strength; it may have even *increased* it. He noted that the majority is unable to say *why* voting power is diminished when an additional election is used to fill newly-created council positions. He pointed out the possibility that there is an increased role of minorities with a larger number of seats, and concluded that there can certainly be no weaker minority position, even if the newly-created seats are filled in off-year elections. Staggered terms he said would be discriminatory if the move were from four council positions elected to two-year terms every other year to elections for two council positions for two-year terms every year. Negative impact does not occur where two

new posts are created, to be filled by an off-year election.

Chief Judge Robinson did not conclude that Lockhart is now a general law city and that its "governance and election plan" could not be approved. Rather, he would have held that the adoption of the charter had no discriminatory effect, and would have re-opened the case for consideration of the question of discriminatory intent in adoption of the charter.

SUBSTANTIALITY OF QUESTIONS PRESENTED

The questions presented are so substantial as to require plenary consideration.

A. As Chief Judge Robinson noted,[7] the proper starting point for analysis of the Lockhart Charter begins with *Beer*. In that case a seven-position city council had five single-member districts and two at-large positions. The city's redistricting plan for the five districts made no change in the at-large seats, and although the new districts increased voting power of the Black minority, the plan did not go as far as it might have gone to eliminate the voting disadvantage of Black voters. The Justice Department interposed an objection and the three-judge court in the District of Columbia denied preclearance to the redistricting plan based on a finding of discriminatory effect. *Beer v. United States*, 374 F.Supp. 363, 402 (D.D.C. 1974), *reversed*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976). The Supreme Court rejected this approach.

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[7] Dissenting Opinion p. 1, *City of Lockhart v. United States, supra.* (Appendix p. 17a) .

Two principles emerge from *Beer* which are apposite to this case. First, it indicates that the key inquiry is into whether there is *retrogression* in the voting power of minorities. A change is to be compared, not to some theoretical norm which would maximize or optimize minority voting power, but rather to the prior system in effect. *Beer v. United States*, 425 U.S. at 141, 96 S.Ct. at 1363, 47 L.Ed. at 639.

Second, in its treatment of the two at-large seats, *Beer* holds that for §5 to be invoked there must be a "change" in a voting practice. Since there was no change in the two at-large seats when the New Orleans voting districts were re-drawn, then retention of the two at-large seats did not trigger §5 review. "[D]iscriminatory practices . . . instituted prior to November 1964 . . . are not subject to the requirement of preclearance [under §5]. *Beer v. United States*, 425 U.S. at 138, 96 S.Ct. 1362, 47 L.Ed.2d at ....

The majority's conclusion that the numbered place feature of the charter election plan constituted a discriminatory "change" within the purview of §5 thus runs directly counter to the language of the Act and to *Beer*. Numbered places were a long-established election feature in Lockhart. The charter carried that feature forward. Election of the mayor and two councilmen in even-numbered years would continue exactly as before. The two new positions were only additional places to be filled under the existing voting practice. Thus there is no §5 change.

The majority states that the prior system of numbered places was illegal, and seeks to distinguish *Beer* on that basis. In doing so, they run afoul of the case of *Perkins v. Matthews, supra*. That case indicates that

it is incorrect and unnecessary to determine the prior legality of the numbered place feature. In *Perkins*, the Supreme Court held that the basis for comparison is the "procedure *in fact* in force or effect" in determining whether a change has occurred. 400 U.S. at 395, 91 S.Ct. at 440, 27 L.Ed.2 at 489 [Emphasis by the Court]. The Lockhart Charter system is not to be compared to what allegedly *should* have been used under general law, but is to be compared to what *actually* was used before the charter. It is therefore incorrect to conclude that the charter somehow "legitimized" an otherwise invalid election feature. If the numbered place feature was in use before, and simply carried forward, then it cannot be a "change" under *Perkins* or "retrogressive" under *Beer*.

The holding by the court below denying preclearance to the numbered-place feature is exactly analogous to the holding of the lower court in *Beer v. United States*, *supra*, with respect to the retention of the at-large features of the New Orleans election plan. In that case the district court had to recognize that no change had occurred with respect to retention of the two at-large seats. Nevertheless, retention of such seats was held to be an alternative basis for invalidation of Plan II. In the appeal even the Attorney General agreed that this holding was incorrect.[8] 425 U.S. at 138, 96 S.Ct.

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[8] The government is not entirely consistent in its approach to §5 cases. In *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56 (5th Cir. 1979) the government argued that, in considering preclearance of an additional seat on an at-large school board, the government could not have rejected such additional seat because such did not exacerbate any existing dilution of black votes. 594 F.2d at 60. The United States Court of Appeals for the Fifth Circuit concluded in

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at 1362, 47 L.Ed.2d at 638. Similarly, the fact that the numbered place feature of pre-charter elections in Lockhart *could* have been eliminated in enacting the charter does not mean that a "change" occurred. As Chief Judge Robinson notes in dissent, "[T]he methodology of electing two new members of the governing body—the new council—in even-numbered years remains exactly as it was for the old commission." Dissenting Opin. p. 8, *City of Lockhart v. United States*, No. 80-364 (D.D.C. July 31, 1981) (See Appendix p. 27a).

The holding by the court below demonstrates the need for a clear restatement of the impact and meaning of the Voting Rights Act. As it did in *Beer v. United States*, the District of Columbia court has again misapplied the meaning of the phrase, "practice or procedure with respect to voting *different* from that in effect [on the applicable date]." 42 U.S.C. §1973c (1981 Supp.). Coverage under the Voting Rights Act is triggered only by a *change*. Numbered places in Lockhart's charter were no more a change than at-large seats in New Orleans' redistricting plan. The district court has again made a fundamental er-

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that case that *Beer* precluded consideration under §5 of any elements of a voting plan that pre-dated the operative statutory date, including the eleven previously-existing at-large seats. *Id.* The government's claim that the at-large seats on the Baton Rouge School Board were unconstitutional is precisely analogous to its claim that pre-charter numbered places were illegal in Lockhart. It is not clear why Baton Rouge's at-large system could not have been reviewed in the §5 submission of the additional seat, while Lockhart's additional council seats required not only review but also denial of preclearance.

ror in decrying change where there is none, and refusing to grant preclearance to this election feature.

B. The reasoning of the majority of the court regarding the staggered term feature again runs counter to *Beer* and *Perkins*. All members of the court recognize that staggered terms are a potentially discriminatory election device. The inquiry, however, should not end there. The staggered term feature simply cannot be considered in the abstract—rather it requires analysis in the context of its origin. The city will concede, as does Chief Judge Robinson, that if the prior system required an at-large election every other year to fill four council positions, and the change was to elections every year to fill two positions, that a discriminatory change could have occurred. That is not the case here. Lockhart did not simply move from non-staggered elections to staggered terms.[9] The staggered term feature was the by-product of the enlarged council. Had the council not been expanded by two positions, staggered terms would not have existed. The majority states that the staggered term feature using numbered posts "affects twice as many elections for a larger number of positions" and thereby creates a "synergistic discriminatory effect." Majority Opinion p. 10, *City of Lockhart v. United States*, No. 80-364 (D.D.C. July 31, 1981) (See Appendix p. 14a). What is missing is an analysis or explanation of *how* that system operates to reduce the chances of a Mexican-American victory in any single election in comparison

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[9] *Compare, City of Rome v. United States, supra,* 446 U.S. at 160, 100 S.Ct. at 1553, 64 L.Ed.2d at 129, (commission that had been elected in same year for identical terms, broken up into staggered terms with multiple elections).

to their chances under the prior system utilized.[10]

No party to this litigation is contending that the expanded size of the council, standing alone, had a discriminatory effect. The evidence was to the contrary.[11] The question thus becomes whether, in electing the two new councilmen in off-year elections, the Mexican-American voter is somehow disadvantaged. It escapes logic to explain how this could be. *Beer* tells us that the purpose of §5 is to protect against changes which destroy "gains . . . achieved in minority political participation." *Beer v. United States*, 425 U.S. at 140-141, 96 S.Ct. at 1363, 47 L.Ed. at 639. The evidence suggests that an expansion in size of an at-large council is a *benefit* to a Hispanic minority. Whether it is indeed a benefit, or whether it is merely a neutral change, an additional election under these circumstances does not and cannot create a retrogression in minority voting power.

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[10] The enlargement feature, even with staggered terms, nevertheless offers an occasional opportunity for vacancies in more than three posts. The 1978 election, for example, was for mayor and three council positions. It is thus possible for all five places to be filled in a single election, by virtue of deaths, resignations, etc.

[11] All the experts who testified agreed that enlarging a city's governing body operates to the *advantage* of the Mexican-American minority. Opposing experts suggested that expanding from three to five councilmen, however, might be too small an increment to result in positive impact. There was no empirical evidence to support that theory, however, and experience in Lockhart supports the underlying thesis, since the first Mexican-American ever to be elected to the city council was elected in 1977, after the Charter was adopted. Majority Opinion p. 5, *City of Lockhart v. United States*, No. 80-364 (D.D.C. July 31, 1981) (See Appendix p. 7a).

In a given political system, an election plan can be devised which greatly improves the political power of Mexican-Americans, or Blacks, or any number of other interest groups. The Voting Rights Act does not, however, require Lockhart to maximize the political strength of Mexican-Americans. *City of Richmond v. United States*, 422 U.S. 358, 370-72, 95 S.Ct. 2296, 2303-2304, 45 L.Ed.2d 245, 256-57 (1975); *Beer v. United States, supra.* All that is required by §5 is that the changes not bring about a *reduction* in the political effectiveness of a protected group. The added election, while perhaps a "change" in the technical sense since staggered terms do result from the enlargement, has no adverse impact when viewed as accompanying an enlargement of the governing body. With no diminution in minority voting power thus identifiable, the court should have concluded no adverse §5 "effect" and proceeded to hear evidence on "intent." See Dissenting Opin. p. 16, *City of Lockhart v. United States*, No. 80-364 (D.D.C. July 31, 1981) (See Appendix p. 37a).

C. The majority on the court has taken a unique and inappropriate step in formulating its declaratory judgment in such way as to invalidate not only the voting features of the home rule charter, but also the charter in its entirety. Following the court's reasoning, had no election feature been changed in the adoption of the charter, the charter should nonetheless have been denied preclearance because it "legitimatized" an election system which the court found objectionable under state law. See Majority Opinion pp. 9-10, *City of Lockhart v. United States*, No. 80-364 (D.D.C. July 31, 1981) (Appendix p. 13a). No case has ever gone so far in interpreting the meaning of "changes" in voting procedures under the Voting Rights Act. Even

if the voting practices were correctly denied preclearance, such does not provide justification for the majority's rejection of the entire charter. The Voting Rights Act is limited to review of voting practices. Use of the provisions of that Act to attempt to invalidate numerous charter provisions in no way related to voting is clearly beyond the power of the district court.

The adoption of a home rule charter is the equivalent at the municipal level to the adoption of a constitution at the national level. A charter is deemed to spring from the people, *Xydias Amusement Co. v. City of Houston*, 185 S.W. 415, 418 (Tex.Civ.App.—Galveston 1916, writ ref'd), 2 E. McQuillin, Municipal Corporations §9.03 (3d ed. 1979), and, unlike a general law city, a home rule city derives its powers directly from the people, not from some legislative grant of power. The people of Lockhart have enacted a home rule form of government which brought about changes far beyond the relatively minor election changes discussed above. If the majority opinion is to be read as denying preclearance to the entire charter, all of this is lost.

It is an entirely unnecessary step to refuse to preclear an entire charter, and to attempt to cause the City of Lockhart to revert to general law status, for in doing so the court strikes an unjustifiable blow against local self-government. The city urges that even if the court were correct in its conclusion on voting procedures, it went out of its way in declaring Lockhart to be a general law city again. The Voting Rights Act should not, and does not, reach so far into the affairs of municipal government.

CONCLUSION

In this case probable jurisdiction should be noted and the case set for oral argument.

Respectfully submitted,

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Appendix

APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF LOCKHART,
Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

Civil Action No. 80-364

MEMORANDUM OPINION

I. *Introduction*

This matter came on for trial before the Court on September 10 and 11, 1980. Upon consideration of the trial and the entire record herein, plaintiff's request for declaratory judgment is denied.

The City of Lockhart initiated this action pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. Plaintiff seeks a declaratory judgment that the adoption in 1973 of a Home Rule Charter does not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race, color or membership in a language minority group. On September 11, 1980, the Court bifurcated the trial. The proceedings were limited to evidence pertaining to the "effect" of the adoption of the Home Rule Charter. The Court reserved the inquiry on the "purpose" of the adoption for a later time, if necessary.

II. *Findings of Fact*

The City of Lockhart is located in Caldwell County, approximately thirty miles south of Austin, Texas.

In 1970, the City of Lockhart had a population of 6,489 persons, of whom 45% were Anglo, 41% were Mexican American and 14% were black. As of 1977, there were 3,267 registered voters in Lockhart, of whom 974 were Mexican Americans.

Under Texas state municipal law, municipalities are categorized as either "general law" cities, "special charter" cities or "home rule" cities. As explained hereinafter, Lockhart is a "general law" city.

A "special charter" city is similar to a "home rule" city in that the powers that each type of city possesses are derived from the same source (charter) and both are subject to the same statutory limitation.

There are, however, significant differences between a "general law" city and a "home rule" city. A "general law" city has the authority to undertake only what is specifically authorized by Texas law, while a "home rule" city has authority to do whatever is not specifically prohibited by state law. Thus, the practical effect is that the authority of a "general law" city to govern its own affairs is limited, while a "home rule" city has broad authority to govern its own affairs.

A "general law" city which operates under a commission form of government has no control over the size or the method of electing its governing body. Texas law rigidly requires that the commission consist of three individuals, a mayor and two commissioners,

and that all three members be elected on an at-large basis. There is no authorization for an election scheme which features single-member districts, numbered posts, residency districts or staggering the terms of the commissioners.

A "general law" city, if it satisfies requirements imposed by state law, may adopt a city charter and become a "home rule" city. In drafting its charter, a municipality is free to adopt any provision which is not inconsistent with state law. Texas state municipal law requires that the municipality in opting for home rule select the powers it desires to exercise and the procedures necessary to implement those powers. In so doing, the municipality is free to choose the form of government under which it will operate and the governing body can be elected at-large or by single-member districts. At its option, the municipality may require that candidates designate the position or post for which they seek election (numbered-post provision). It may also provide that the terms of the members of the governing body be staggered. A "general law" city does not enjoy this latitude of choice.

Prior to February 20, 1973, the City of Lockhart was a "general law" city which operated under a commission form of government. As authorized by state law, the city was governed by a mayor and two commissioners who were elected at the same time on an at-large basis to two-year terms. In addition, and contrary to Texas law, candidates for election to the city commission were required to designate the places they sought; i.e., numbered posts.

The limitations imposed upon the actions of "general law" cities by state law led the City of Lockhart

to study, during 1972, the feasibility of acquiring "home rule" status. In July 1972, the Lockhart City Commission appointed for this purpose, pursuant to state law, a fifteen-member charter study committee composed of nine (9) Anglos, four (4) Mexican Americans and two (2) blacks. The charter study committee recommended that a charter commission be formed to draft a "home rule" charter for the City of Lockhart. The study committee was itself later elected as the Charter Commission. The Charter Commission used as a model the charter of the City of Gonzales, Texas, a town similar in size to Lockhart and located approximately thirty miles south of Lockhart. The plan adopted followed the Gonzales model with the principal difference being that the Lockhart plan provided for numbered-post positions.

The Home Rule Charter, as drafted by the Lockhart Charter Commission, was adopted by the citizens of Lockhart on February 20, 1973. Under the charter the new plan of government for the City of Lockhart was a council-manager form, consisting of a mayor and four councilmembers elected to numbered posts on an at-large basis. The charter also provided that the mayor and two councilmembers would be elected one year and the remaining two councilmembers would be elected the following year (staggered terms). Elections pursuant to the plan were held from the time of its adoption in 1973 until 1978. This governance and election plan is before the Court for Section 5 review.

In 1977, a lawsuit challenging, on constitutional grounds, the system of electing members to the city council was filed against the City of Lockhart by four Mexican-American citizens. The record in that action revealed that the governance and election plan adopted

by the City of Lockhart's Home Rule Charter had not received the requisite preclearance, pursuant to Section 5 of the Voting Rights Act. *Cano v. Kirksey*, No. 77-CA-133 (W.D. Tex. 1977).

Another action was thereafter filed against the City Lockhart, seeking to enjoin the city from utilizing this or any unprecleared change affecting voting, unless and until such change received the necessary Section 5 preclearance. The Court, in granting injunctive relief, found that the "home rule" governance and election plan had not received the necessary Section 5 review. The Court found that "among the major changes required by the adoption of the Home Rule Charter was to enlarge the city council to four members, plus the mayor, and to adopt a numbered place system for the election of councilmembers." *Cano v. Chessar*, A-79-CA-032 (W.D. Tex. March 2, 1979).

Following the order of the Court in *Cano v. Chessar*, A-79-CA-032, the City of Lockhart submitted the "home rule" governance and election plan to the Attorney General for Section 5 review. The City of Lockhart's Section 5 submission was received by the Attorney General on May 7, 1979. On June 27, 1979, the Attorney General requested that the city provide additional information. The city's response was received on July 17, 1979, and a Section 5 objection to the home rule governance and election plan was interposed, by the Assistant Attorney General acting on behalf of the Attorney General, on September 14, 1979. The present action by the City of Lockhart followed.

There exists a pattern of racial bloc voting in the City of Lockhart. Election returns from municipal elections held since 1973 show a high correspondence

between Spanish-surnamed voters who voted in the particular election and the number of votes received by the Spanish-surnamed candidate.

Although Mexican Americans constitute over 40% of the population of the City of Lockhart, only one Mexican American has ever served on the Lockhart governing body. The one Mexican American to win a municipal election contest, Mr. Rangel, won a position on the council in 1978, when five persons, including four Anglos, sought election to Place 1. In that election 660 of the total of 1,993 voters were Mexican Americans and Mr. Rangel received 655 votes (the close similarity of those figures is clearly indicative of racial bloc voting). Since the Anglo vote was split among four Anglo candidates, Mr. Rangel prevailed with the highest number of votes.

Mr. Rangel's victory demonstrates that the larger number of candidates for a given position, the better is the chance of Mexican Americans to elect candidates of their choice. The voting results before the Court bear this out. For example, in the same year that Mr. Rangel was elected to Place 1, a Mexican American sought the position of mayor and another sought the position as councilmember for Place 2. In each instance, the number of votes received by the Mexican American candidate was approximately the same as the number of Mexican American voters. However, in each instance, the remaining votes were split among only three Anglo persons who were serious candidates, and in each instance the Mexican American candidate was defeated.

Under an at-large electoral system without numbered posts, a cognizable voting minority can leverage

their voting strength by single-shot or bullet voting.

The imposition of numbered posts diminishes this leverage. It does so in two ways. Expert witnesses for all parties agreed that the imposition of a numbered-post provision reduces the field of candidates for election, and at the same time, highlights the individual candidates for each position. This double result nullifies the effects of single-shot voting by forcing minority voters to cast a vote for each numbered position. This reduction in the size of the candidate field and consequent highlighting of candidates is detrimental to minority or minority-supported candidates.

The employment of staggered terms further diminishes this leverage. Staggered terms in an electoral system highlight individual contests and emphasize individual confrontations between candidates. This is usually to the detriment of the minority or minority-supported candidate, because "single shot" voting is less effective.

The enlargement of Lockhart's governing body from three to five does not offset the disadvantage to minorities of numbered posts and staggered terms. Although the study relied upon by Dr. Taebel indicates, as a general theory, that enlargement of a city's governing body may enhance the effect of the minority's franchise, the enlargement at issue here (i.e., from three to five members) is not significant enough to provide any clear benefit to Mexican American voters since both the three-member general law commission and the five-member home rule council would be classified as "small."

III. *Conclusions of Law*

1. This Court has jurisdiction to hear and determine the plaintiff's request for Section 5 preclearance of the voting changes involved in this litigation. 42 U.S.C. 1973c; 28 U.S.C. 1346(a)(2).

2. The Court is properly convened as a court of three judges. 42 U.S.C. 1973c; 28 U.S.C. 2284.

3. The Voting Rights Acts of 1965, 42 U.S.C. §1973 *et seq.* was enacted to insure the protection of rights guaranteed by the Fifteenth Amendment and "to rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

4. The State of Texas is subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, 40 Fed. Reg. 43746 (1975).

5. Voting changes enacted or administered by the State of Texas and the City of Lockhart after November 1, 1972, are subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

6. Under Section 5, the City of Lockhart may not enforce or implement any change in "any voting qualification or prerequisite to voting, or standard practice or procedure with respect to voting," unless such change has either been precleared by the Attorney General, or unless the City of Lockhart obtains a declaratory judgment in the United States District Court for the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race

or color [or membership in a language minority group]." 42 U.S.C. 1973c.

7. The "home rule" governance and election plan adopted by the City of Lockhart on February 20, 1973 is subject to the preclearance requirements of Section 5. *Cano v. Chessar*, A-79-CA-0032 (W.D. Tex., March 2, 1979).

8. The Court concludes that the numbered-post provision of the election plan set forth in the Lockhart City Charter is subject to Section 5 review. In reaching this conclusion, the Court is mindful of the U.S. Supreme Court's decision in *Beer v. United States*, 425 U.S. 130 (1975), but concludes that *Beer* is clearly distinguishable from the instant case. In *Beer*, the City of New Orleans sought a judgment declaring that a reapportionment of its five councilmanic districts did not violate Section 5. The 1954 New Orleans city charter provided for a seven-member city council, with one member being elected from each of five councilmanic districts, and two being elected at large. The reapportionment was required after each decennial census by the same city charter.

The U.S. District Court for the District of Columbia held that the entire reapportionment plan for five councilmanic districts was invalid because it would have the effect of abridging the right to vote on account of race or color. The District Court also held, more pertinently, that as a separate and independent ground, the reapportionment plan could not withstand Section 5 scrutiny solely because it did not enhance the minority vote by eliminating the two discriminatory at-large seats which had existed without change since 1954. On this aspect of the case, the U.S. Su-

preme Court held that the two at-large councilmanic seats were not subject to Section 5, stating:

> "Discriminatory practices . . . instituted prior to Nov. 1964 . . . are not subject to the requirement of preclearance under Section 5. (Citations omitted). The ordinance that adopted [the Reapportionment Plan] made no reference to the at-large councilmanic seats. Indeed, since those seats had been established in 1954 by the city charter, an ordinance could not have altered them; any change in the charter would have required approval by the city's voters. 425 U.S. 138-9.

The Court also held that the reapportionment plan enhanced the position of racial minorities and that such an ameliorative plan could not have the effect of denying or abridging the right to vote on account of race or color in violation of the statute.

The circumstances presented herein are different. Here, the previously illegal numbered posts were included specifically in the Home Rule Charter presently at issue, and the charter was approved specifically by the voters in Lockhart. This approval abolished completely the commission form of government and substituted in its stead an entirely new form of city government with an entirely new election scheme. In *Beer*, the legitimate albeit discriminatory at-large seats established in 1954 were not mentioned in the implementing ordinance, and the voters were not called upon to consider them. As the language from *Beer*, cited *supra*, indicates, these were the facts that the U.S. Supreme Court expressly relied on.

Moreover, when Lockhart originally adopted the

numbered-post provisions of its election plan in 1917, it did so without authority and in violation of state law. As a "general law" city, the power of Lockhart's city government was limited to those prescribed under state law. Tex. Civil Statutes §§961 *et seq.* The state legislature had determined the methods of election of general law cities. Tex. Civil Statute §1158. There is no provision under Texas law authorizing "general law" cities to use numbered posts.

Under Texas law, a city can exercise only those powers conferred by law. *City of West Lake Hills v. Westwood Legal Defense Fund,* 598 S.W.2d 681 (Tex. Civ. App. 1980). All acts done beyond those powers conferred are void. *City of Fort Worth v. Lillard,* 272 S.W. 577 (Tex. Civ. App. 1925).[1] Moreover, the mere assumption and assertion by a city of a power not granted to it gains nothing by lapse of time. *Conklin v. City of El Paso,* 44 S.W. 879, 882 (Tex. Civ. App. 1897) *cf. City of Beaumont v Moore,* 202 S.W.2d 448 (Supreme Court of Texas 1947)(where a contract of a municipal corporation is ultra vires and void, there is no contract to rescind); *Pasadena Police Officers Association v. Pasadena,* 497 S.W.2d 388 (Tex. Civ. App. 1973) (A municipality's void act, one that is beyond its powers may not be validated upon principles of estoppel); *Young v. City of Seagoville,* 421 S.W.2d 484 (Tex. Civ. App. 1967) (ordinance void at time of adoption for conflict with statute statute did not become valid upon repeal of

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[1] This is the universal rule of application; *e.g., Marengo v. Rowland,* 105 N.E. 285, (Ill. 1914) (ultra vires actions held of no effect); *Maryland & D.C. Rifle & Pistol Association v. Washington,* 442 F.2d 123 (D.C. Cir. 1971). 56 Am. Jur.2d 406, Municipal Corporations, Counties and other Political Subdivisions §374 and cases cited in n.16 therein.

statute). As this Court interprets the foregoing authorities, the numbered-post provision, illegitimate at inception, must be treated for Section 5 purposes as if it had never existed until it appeared legitimately pursuant to Texas law in the 1975 Lockhart City Charter. In summary, the validation of the previously illegal numbered posts represents a change in voting procedures which is completely dissimilar to the continuation of the two at-large councilmanic seats in *Beer* which were unchanged.

The Court does not consider *Perkins v. Matthews*, 400 U.S. 379 (1971) to undercut this conclusion. In *Perkins*, plaintiffs sought to enjoin the 1969 election for city offices in Canton, Mississippi. Plaintiffs alleged that the newly utilized at-large election of aldermen differed from the ward election feature utilized prior to November 1, 1964. The at-large feature had been required by a Mississippi state statute since 1962 that had heretofore been overlooked. The city argued that, having learned of the 1962 statute, it had no choice but to comply with it in the 1969 elections and that there was no change subject to §5 preclearance. The United States Supreme Court noted first that a change from ward to at-large alderman elections had been found previously to be a change within the coverage of §5. *Id.* at 394. In the context of the suspicious facts before it, the Court extended the coverage of §5 to include Canton's belated 1979 change from ward to at-large even though it had been required since 1962, before the operative date of §5. In so doing, the court extended §5 protection to the fullest extent, in accordance with the policy underlying the Voting Rights Act as set forth in prior case law and the legislative history. This Court, in reaching its conclusion that Lockhart's numbered post provision utilized illegally for

over 50 years and legitimatized in 1973 is within §5 seeks to do the same. To hold otherwise, to permit plaintiff's discriminatory numbered-post provision to escape §5 preclearance, would reward plaintiff for its illegal activities in the past.

There is an additional reason why the numbered-post provision is a Section 5 change and must be reviewed. Prior to February 20, 1973, the city was governed by a mayor and *two* commissioners who were elected on an at-large basis to two-year terms at the same time. The new city charter provided that Lockhart would be governed by a mayor and *four* commissioners elected on an at-large basis to two-year terms, and the terms were to be *staggered.* The mayor and two council members would be elected in one year and the remaining two council members the next. The new plan requires elections every year as opposed to every other year under the old plan, and the discriminatory impact of the numbered posts under the new plan affects twice as many elections for a larger number of positions. Section 5 is concerned with the reality of changed practices as they affect minority voters, *Georgia v. United States,* 411 U.S. 526 (1973), and is intended to reach any enactment which alters the election law in even a minor way. *Allen v. State Board of Elections,* 393 U.S. 544 (1969). Even assuming the validity of the original two numbered-post provisions, the provision for an additional two numbered posts in conjunction with the provision for staggered terms has a synergistic discriminatory effect. This is again completely different from the continuation of the provision for two at-large councilmanic seats in *Beer.*

9. In this declaratory judgment action under Section 5, the plaintiff has the burden of proving that the governance and election plan at issue does not have

the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The absence of both discriminatory purpose and discriminatory effect must be established by plaintiff. The inability of the plaintiff to establish the absence of the prohibited effect precludes the plaintiff from obtaining the requested relief. 42 U.S.C. 1973c; *City of Rome v. United States*, 100 S.Ct. 1548 (1980); *South Carolina v. Katzenbach, supra*, 383 U.S. at 335; *Georgia v. United States*, 411 U.S. 526 (1975); *City of Richmond v. United States*, 422 U.S. 358 (1975); *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd.*, 410 U.S. 972 (1973); *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Beer v. United States*, 425 U.S. 130, 140-41 (1976).

10. Both the Congress and the Supreme Court have established that the imposition of numbered posts and staggered terms can have a discriminatory impact on minority voting rights. The Supreme Court has recognized that an election plan which contains features such as numbered posts and staggered terms, when combined with the presence of racial bloc voting, has a discriminatory impact on the group of persons whom the Voting Rights Act was designed to protect. In extending the Voting Rights Act of 1975, the Congress found numbered posts to be a potentially discriminatory device. *City of Rome v. United States*, 100 S. Ct. 1548 (1980); S. Rep. No. 94-925, 94th Cong. 1st Sess. 27-28 (1975); H.R. Rep. No. 94-126, 94th Cong. 1st Sess. 19-20 (1975).

11. The Court recognizes that the City of Lockhart is not required to search for ways to maximize the political strength or representation of Mexican Ameri-

can citizens. *City of Richmond v. United States, supra,* 422 U.S. at 370-72; *Gilbert v. Sterrett,* 509 F.2d 1389, 1394 (5th Cir. 1975); *Cousins v. City Council of the City of Chicago,* 503 F.2d 912, 920 (7th Cir. 1974); *Turner v. McKeithen,* 490 F.2d 191, 197 (5th Cir. 1973); *Howard v. Adams County Board of Supervisors,* 453 F.2d 455, 458 (5th Cir. 1972).

12. The plaintiff has failed to demonstrate, however, that the "home rule" governance and election plan will not have a discriminatory effect on Mexican-American voters' ability to elect candidates of their choice. Although the at-large system, by itself, does not deny Mexican-American voters the opportunity to elect candidates of their choice, the imposition of the numbered-post and staggered-term provisions has clearly had and will continue to have such an effect on Mexican-American voters.

13. Unlike *Beer,* the apportionment plan before us is not ameliorative but is retrogressive because the ability of Mexican Americans to participate in the political process and to elect their choices to office is diminished by the numbered-post and staggered-term provisions.

14. The failure of the city to sustain its burden of showing that the adoption of the home rule governance and election plan has not had, and will not in the future have, the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group requires that the request for declaratory judgment be denied. 42 U.S.C. 1973c; *Hale County v. United States,* C.A. 77-0286 (D.D.C Sept. 4, 1980); *City of Rome v. United States, supra; Donnell*

v. United States, C.A. 78-0392 (D.D.C. July 31, 1979) *aff'd.* 100 S. Ct. 1000 (1980).

In light of the foregoing, this action is dismissed. An appropriate order is entered herewith.

For the Court.

Dated: July 30, 1981

/S/
JOHN H. PRATT

/S/
JUNE L. GREEN

ROBINSON, *Chief Judge*, dissenting:

With all due respect for my colleagues' views, I am unable to join in their refusal to preclear the contested provisions of the City of Lockhart's home-rule charter. My reading of the Supreme Court's decision in *Beer v. United States*[1] leads me to conclude, on the facts here, that the numbered seats and staggered terms incorporated into the charter's scheme of councilmanic elections will not have the effect of denying or abridging the right to vote on account of race, color or language-minority membership within the meaning of Section 5 of the Voting Rights Act of 1965.[2] Accordingly, I must dissent.

I. BACKGROUND

A. *The Beer Decision*

My starting point is *Beer*. There the City of New Orleans sought a judgment declaring that a proposed reapportionment of councilmanic districts did not succumb to Section 5. Notwithstanding the reapportionment plan's capability of increasing the power of the

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[1] 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976).

[2] Pub. L. No. 89-110, §5, 79 Stat. 439 (1965), as amended, 42 U.S.C. §1973c (1976). The Act is hereinafter cited as codified. I do not address the question whether the charter provisions in suit were conceived with any such purpose in mind. See note 37 *infra*.

city's black vote somewhat,[3] this court withheld the requested relief on the ground that the plan left black citizens unable to elect councilmembers in the proportion they bore to the city's population or the total of its registered voters.[4] As an independent reason for denying preclearance, this court further held that the city's failure to eliminate a 1954 charter provision establishing two at-large council seats itself had the effect of abridging the right to vote on the basis of race.[5]

On appeal, the Supreme Court first addressed the ruling in regard to the at-large seats. Noting the Government's concession of error thereon, the Court explained that

> [t]he language of § 5 clearly provides that it applies only to proposed changes in voting procedures. "[D]iscriminatory practices . . . instituted prior to November 1964[6] . . . are

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[3] The New Orleans reapportionment plan envisioned production of black population majorities in two councilmanic districts and a black voter majority in one. Under the pre-existing plan, black citizens were a majority of the population in only one district and a minority of registered voters in all. See *Beer v. United States, supra* note 1, 425 U.S. at 136, 96 S.Ct. at 1361, 47 L.Ed.2d at 636.

[4] *Beer v. United States*, 374 F.Supp. 363, 389-390 (1974) (three-judge court).

[5] *Id.* at 402.

[6] Voting-procedure changes occurring in New Orleans after November 1, 1964, statutorily became subject to §5 scrutiny. The relevant date for Lockhart is November 1, 1972. See 42 U.S.C. §1973c (1976).

> not subject to the requirement of preclearance [under § 5]."[7]

Because the charter provision creating the at-large seats had been adopted in 1954,[8] the Court held that the seats "were not subject to review in this proceeding under § 5."[9]

The Court then turned to a claim of further error in the ruling that the reapportionment plan was unacceptable for the additional reason that it would dilute the black vote in New Orleans' councilmanic elections. Adverting to the legislative history of the Act, the Court quoted at length from the House Report:

> "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory. . . . Congress therefore decided, as the Supreme Court held

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[7] *Beer v. United States, supra* note 1, 425 U.S. at 138, 96 S.Ct. at 1362, 47 L.Ed.2d at 628 (bracketed material in original), quoting United States Commission on Civil Rights, The Voting Rights Act: Ten Years After 347 (1975) [hereinafter cited as *Ten Years After*].

[8] See *Beer v. United States, supra* note 1, 425 U.S. at 138, 96 S.Ct. at 1263, 47 L.Ed.2d at 638.

[9] *Id.* at 139, 96 S.Ct .at 1362, 47 L.Ed.2d at 638.

> it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.' "[10]

"Section 5 was intended," the Court said, " 'to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through *new* [discriminatory] procedures and techniques.' "[11]

The *Beer* Court also looked to a legislative event transpiring after adoption of the Act:

> When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that "the standard [under § 5] can only be fully satisfied by determining . . . whether the ability of minority groups to participate in the political process and to

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[10] *Id.* at 140, 96 S.Ct. at 1363, 47 L.Ed.2d at 639, quoting H.R. Rep. No. 94-196, 94th Cong, 1st Sess. 57-58 (1975) (additional citations omitted). "By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent States from 'undo[ing] or defeat[ing] the rights recently won' by Negroes." *Beer v. United States, supra* note 1, 425 U.S. at 140, 96 S.Ct. at 1363, 47 L.Ed.2d at 639, quoting H.R. Rep. No. 91-397, 91st Cong., 1st Sess. 8 (1969). See also *South Carolina v. Katzenbach*, 383 U.S. 301, 355, 86 S.Ct. 803, 832, 15 L.Ed. 769, 802 (1966).

[11] *Beer v. United States, supra* note 1, 425 U.S. at 140-141, 96 S.Ct. at 1363, 47 L.Ed.2d at 639, (bracketed material in original), quoting S. Rep. No. 94-295, 94th Cong., 1st Sess. 19 (1975) (emphasis supplied).

> elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting. . . ."[12]

"In other words," the Court admonished, "the purpose of §5 has always been to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise."[13]

Employing this analysis, the Court held that whatever deficiencies from another viewpoint the New Orleans plan might have, an electoral scheme that enhanced the voting power of racial minorities could "hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of §5."[14] Accordingly, the Court set this court's judgment aside and remanded for further proceedings.[15]

B. *The Home-Rule Charter*

A brief description of the case at bar will highlight the issues. Prior to adoption of its home-rule charter in 1973, the City of Lockhart was governed by a commission composed of a mayor and two commissioners.[16]

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[12] *Beer v. United States, supra* note 1, 425 U.S. at 141, 96 S.Ct. at 1363, 47 L.Ed.2d at 639, quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 60 (1975) (emphasis in original).

[13] *Beer v. United States, supra* note 1, 425 U.S. at 141, 96 S.Ct. at 1364, 47 L.Ed.2d at 639 (emphasis supplied).

[14] *Id.*

[15] *Id.* at 143, 96 S.Ct. at 1364, 47 L.Ed.2d at 640.

[16] See Majority Opinion (Maj. Op.) at 3.

All three were elected at large for two-year terms by pluralities at elections held in even-numbered years.[17] Consistently since 1917, the two commissioner posts were numbered; that is, candidates were required to designate which of the two seats they sought.[18]

The home-rule charter provides, however, for a council-manager form of government, consisting of a mayor and four councilmembers.[19] The mayor and two councilmembers are to be elected at-large by pluralities in even-numbered years for two-year terms,[20] and the two council seats are to be numbered.[21] The two additional councilmembers are to be elected in similar fashion—at-large on a numbered-post basis by pluralities for two-year terms—except that elections for these two are to be held in odd-numbered years.[22] Thus, the three changes that would be made in the city's electoral scheme by the movement from commission to council-manager government are: the increase from two commissioner to four council seats, the numbering of the two new seats, and the staggering of council-members' terms.

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[17] *Id.*

[18] *Id.* at 3, 9. For reasons hereinafter explained, see text *infra* at note 51, I do not join my colleagues in inquiring whether the city's pre-charter use of these numbered posts was authorized by state law. See *id. at* 9-10. It bears mention, however, that the practice was never challenged, and that it remained in vogue until Lockhart's home-rule charter emerged in 1973.

[19] *Id.* at 4.

[20] *Id.*

[21] *Id.*

[22] *Id.*

The city submitted the charter to the Attorney General for Section 5 preclearance and, failing that, followed with this action for a preclearing declaratory judgment. The new plan is attacked[23] on the ground that the city has not shown that the numbered seats on the council and the staggered terms of councilmembers pass muster under Section 5, and my colleagues hold that they do not.[24] Now considering these facets of the controversy in turn, I elucidate my disagreement.

II. ANALYSIS

A. *Basic Considerations*:

Racial bloc-voting is a reality in the City of Lockhart,[25] and indubitably numbered posts and staggered terms tend to curb the ability of minorities to elect minority candidates.[26] Minority voting power may be strongly felt when a large number of candidates for several offices are pitted against each other in a single plurality-win contest, from which the top vote-getters will emerge victorious.[27] If, for example, there are four

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[23] By the United States and by the intervenor.

[24] Maj. Op. at 8-13. My colleagues seemingly concede, and I agree, that the increase in the size of Lockhart's governing body, standing alone, will not dilute the voting power of its minorities. See *id.* at 6.

[25] See *id.* at 5-6.

[26] See generally *Ten Years After, supra* note 7, at 206-208; *City of Rome v. United States,* 446 U.S. 156, 184 n.19, 185 n.21; 100 S.Ct. 1548, — n. 19, — n.21, 64 L.Ed.2d 119, 144 n.19, 145 n.21 (1980).

[27] See *Ten Years After, supra* note 7, at 206-208.

unnumbered offices and twelve candidates are vieing for them in such a contest, the four receiving the highest number of votes will prevail.[28] By concentrating its votes on one candidate—so-called "single-shot" voting[29]—and when aided by a splitting of the majority vote among more than one candidate, a minority group succeeds or assists in electing its own candidate if he or she comes in no lower than fourth.[30]

Numbered posts and staggered terms—singly or in combination—render single-shot voting less potent, if not wholly ineffective, by inducing head-to-head contests in which only one candidate can win. By requiring candidates to specify the posts to which they seek election, numbering individualizes the contests and insures that only the candidate garnering the highest number of votes for a particular post will secure it.[31] Similarly, by staggering the terms of offices, fewer posts are at stake in any given election, and the number of top vote-getters who can win is correspondingly reduced.[32] If the terms are completely staggered—that

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[28] See note 30 *infra*.

[29] "Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates." *Ten Years After*, *supra* note 7, at 207.

[30] *Id.* at 206-207. The example assumes not only that there is no majority-vote requirement but also that there is no impediment to single-shot voting.

[31] *Id.* at 207.

[32] See *id.* at 208. Thus, if only two rather than four offices are open at election time, the minority candidate must place at least second.

is, only one post becomes vacant in each election year —any potential that single-shot voting might otherwise have is entirely eliminated, just as it is by post numbering.[33] Both procedures also tend to highlight racial identities of candidates in multiracial campaigns, increasing the likelihood that majority voters will vote against minority candidates simply because they are minority members, rather than for candidates on the basis of perceived merit.[34] When numbered posts and staggered terms exist in tandem, the racial factor becomes heightened even further.[35]

That numbered posts and staggered terms can, and frequently do, impact minority voting adversely, however, is not the end of the analysis demanded by Section 5. As *Beer* instructs, Section 5 bars voting procedures only when they are "changes" within its meaning and as such they "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[36] I thus proceed to consider the procedures here under assault in light of these statutory limitations.[37]

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[33] *Id.* at 208.

[34] See Maj. Op. at 6.

[35] Racial identities obviously are most visible when an election is for only one office.

[36] *Beer v. United States, supra* note 1, 425 U.S. at 141, 96 S.Ct. at 1364, 47 L.Ed.2d at 639.

[37] Under §5, the city bears the burden of proving both an absence of discriminatory purpose and a lack of discriminatory effect. See, *e.g., City of Rome v. United States, supra* note 26, 446, U.S. at 183 n.18, 100 S.Ct. at ___n. 18, 64 L.Ed.2d at 144 n.18; *Beer v. United States, supra* note 1, 425 U.S. at 140-141,

(footnote continued on following page)

B. *The Numbered Posts*

Save for the office of mayor, numbered seats have been standard in Lockhart's elections since 1917—almost 50 years before passage of the Voting Rights Act. Nonetheless, my colleagues deem the charter provision perpetuating numbering of the two original seats on the city's governing body a "change" in voting procedure subject to Section 5 review.[38] They would sidestep the Supreme Court's teaching on that score by distinguishing *Beer* on two grounds. First, they point out that while the two New Orleans at-large seats established in 1954 were not mentioned in that city's 1971 redistricting plan, Lockhart's new charter ushers in a new form of municipal government.[39] That is so, but the methodology of electing two members of the governing body—the new council—in even-numbered years remains exactly as it was for the old commission.[40] Nothing in the record suggests for the occupants of these two seats anything more than new

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(footnote continued from previous page)

96 S.Ct. at 1363, 47 L.Ed.2d at 638-639; *Georgia v. United States*, 411 U.S. 526, 538, 93 S.Ct. 1702, 1709, 36 L.Ed.2d 472, 483 (1973). We bifurcated trial of the instant case for initial consideration only of the new charter's effect, leaving the purpose in adopting it for later inquiry should the occasion arise. Accordingly, I restrict myself at this stage of the litigation solely to the issue of effect. But see text *infra* at note 71.

[38] Maj. Op. at 8-11.

[39] *Id.* at 9.

[40] See text *supra* at notes 16-22.

titles.[41] I fail to see how mere renaming of the two posts removes this case from the controlling authority of *Beer*.

My colleagues further say that while New Orleans had "legitimate[ly]" acquired the two at-large seats by its city charter in 1954, Lockhart originally had instituted and long had maintained numbered commissioner seats "without authority and in violation of state law."[42] The city hotly disputes this premise, but I need not enter the debate, for it is completely beside the point. Section 5 subjects voting procedures to need for proclearance only to the extent that they may be "different from [those] in force or effect on" the date statutorily made relevant.[43] Congress explicated no distinction between valid and invalid preexisting procedures, and the Supreme Court has stated unambiguously that " '[d]iscriminatory practices . . . instituted prior to [the date statutorily pertinent] . . . are not subject to the requirement of preclearance [under §5].' "[44] More importantly, the Court has made plain

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[41] Delbert A. Taebel, an expert, testified that Lockhart's pre-charter characteristics were similar to those of a council-manager form of government. Trial Transcript (Tr.) 68; the commissioners, he said, did not perform administrative tasks. Tr. 75. "A commissioner in this sense," the witness explained, "was actually a council member. In Texas we use the word 'commission' and 'council members' interchangeably frequently," Tr. 75, and the change in name from commissioner to councilperson is without significance. Tr. 75.

[42] Maj. Op. at 9.

[43] 42 U.S.C. § 1973c (1976).

[44] *Beer v. United States, supra* note 1, 425 U.S. at 138, 96 S.Ct. at 1362, 47 L.Ed.2d at 638, (bracketed material in original), quoting *Ten Years After, supra* note 7, at 347.

enough that a voting procedure is "in force or effect" for purposes of Section 5 coverage notwithstanding even gross inconsistency with state law. In *Perkins v. Matthews*,[45] the City of Canton, Mississippi, switched in 1969 from ward to at-large elections of aldermen. That very change was commanded by a 1962 Mississippi statute, but Canton ignored the statute and in 1965 elected aldermen by wards as previously it had done in 1961.[46] The question was the procedure "in force or effect" on November 1, 1964, when Canton became subject to the Act.[47] In concluding that the change was covered by Section 5, the Court reasoned:

> In our view, § 5's reference to the procedure "in force or effect on November 1, 1964," must be taken to mean the procedure that would have been followed if the election had been held on that date. The judgment is necessarily a matter of inference in this case since Canton did not hold a municipal election on November 1, 1964....
>
> With the benefit of hindsight, ... we know that Canton elected its aldermen by wards in its June 1965 municipal election. The record reflects no relevant change between November 1964 and June 1965 to suggest that a different procedure would have been in effect if the elections had been held seven

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[45] 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971).

[46] *Id.* at 394, 91 S.Ct. at 439-440, 27 L.Ed.2d at 488.

[47] *Id.*

> months earlier. Consequently, we conclude that the procedure *in fact* "in force or effect" in Canton on November 1, 1964, was to elect aldermen by wards. That sufficed to bring the 1969 change within § 5.[48]

The significance of *Perkins* for the case at hand can hardly be mistaken. The Court held that the procedure "in force or effect" on November 1, 1964, was ward election of alderman, even though that procedure directly contravened a state statute enacted two years earlier. That an existing procedure violates state law, then, is not itself an escape route from Section 5 coverage. Moreover, the procedure "in force or effect" in Canton on the date relevant was "necessarily a matter of inference."[49] The case now before us is much stronger, for we know that Lockhart actually had assigned post-numbers to the two original seats on its governing body, and had done so for more than a half-century before the home-rule charter came about.[50] No less in Lockhart than in Canton, it is "the procedure *in fact* in force or effect," whatever its legal status under state law, that measures the coverage of Section 5.

Bound by an interpretation so clear, I cannot agree that the Lockhart charter's adoption of an ongoing pre-1964 voting procedure—even one that until then

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[48] *Id.* at 394, 395, 91 S.Ct. at 440, 27 L.Ed.2d at 488-48.

[49] The inference was compelling enough to overcome the normal presumption that public officials act in accordance with law, and to set for naught Canton's argument that it did no more than obey the 1962 statute in its 1969 elections. *Id.* at 394-395, 91 S.Ct. at 440, 27 L.Ed.2d at 488-489.

[50] See text *supra* at note 18.

may have been unlawful under state law—is a change in that procedure within the contemplation of Section 5. For that reason, I do not join my colleagues in their hazardous undertaking to determine whether Lockhart's utilization of numbered commission seats was ultra vires under state law, and thus was vulnerable to attack on that ground.[51] I simply cannot concur in their conclusion that, for purposes of Section 5 coverage, the numbered-post procedure applied to those two seats is to be treated as though it was not "in force or effect" during the pre-charter era.

My colleagues also that "[e]ven assuming the validity of the original two numbered-post provisions, the provision for an additional two numbered posts in conjunction with the provision for staggered terms have a synergistic discriminatory effect."[52] While I believe the numbered-post technique as applied to the two council seats that are originals is not subject to Section 5 preclearance, the expansion of Lockhart's governing body to four numbered council seats admittedly is a "change" intercepted by Section 5 for preclearance.[53] But the conclusion that this change will deny or abridge minority voting rights within the meaning of Section 5 runs afoul of another branch of the *Beer* ruling.[54]

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[51] See Maj. O. at 9-10.

[52] *Id.* at 11.

[53] See,*e.g.*, *United States v. Board of Comm'rs*, 435 U.S. 110, 122-123, 98 S.Ct. 965, 974-975, 55 L.Ed.2d 148, 160-161 (1978), and cases there cited.

[54] I later consider my colleagues' argument on synergism. See Part II(C) *infra*.

After reviewing relevant aspects of the Act's legislative history, the *Beer* Court made known that the crucial inquiry under Section 5 is " 'whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting.' "[55] That is because "the purpose of § 5 has always been to insure that no voting-procedure change would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise."[56] It is abundantly clear that the addition of the two numbered council seats to be filled in odd-numbered years in no way deteriorates the strength of the minority vote in Lockhart.[57] For many years before the city adopted its home-rule charter, candidates for commissioner posts were required to designate which of the two seats then available they would campaign for,[58] and consequently no opportunity for single-shot voting in those elections was ever presented.[59] Under the 1973 charter, councilmanic candidates must specify one of the seats now provided,[60] and single-shot balloting re-

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[55] *Beer v. United States, supra* note 1, 425 U.S. at 141, 96 S.Ct. at 1363, 47 L.Ed.2d at 639, quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 60 (1975) (emphasis in original).

[56] *Beer v. United States, supra* note 1, 425 U.S. at 141, 96 S.Ct. at 1364, 47 L.Ed.2d at 639 (emphasis supplied).

[57] Mexican Americans are by far the largest minority in Lockhart, see Maj. Op. at 1, and the minority upon which this litigation directs its principal focus.

[58] See text *supra* at note 18.

[59] See text *supra* at notes 25-33.

[60] See text *supra* at notes 21-22.

mains an impossibility, but the decisive question is whether Lockhart's minorities are worse off than they were before. My colleagues point out that since the two new council seats, like the two old commissioner seats, are numbered posts, "the discriminatory impact of the numbered posts . . . affects twice as many elections for a larger number of positions."[61] That, of course, is true, but only because Lockhart would now elect two council members every year instead of two commissioners every other year, and my colleagues do not say why they believe minority voting power is thereby reduced from the pre-charter level. Nor do they comment on the possibility—which draws support from evidence in this case—that by increasing the number of seats on the governing body, the new charter may offer minorities a more effective role in the selection of its membership than they had before.

From my standpoint, the focus on numbered council seats narrows to this. In pre-charter days, Lockhart's voters elected two members of its governing body in even-numbered years from candidates declaring their aspirations for a specific seat. Under the charter, exactly the same thing will also occur in odd-numbered years. Lockhart's voters would go to the polls twice as frequently to ballot on council membership, but the voting strength of Lockhart's minorities, whether or not enhanced, would not be diminished one whit. Every year, as a councilmanic election in Lockhart approaches, minorities would occupy the same relative position they formerly did in every alternate year—perhaps no stronger, but certainly no weaker. The unmistakable thrust of *Beer* is that Section 5's ban is directed

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[61] See Maj. Op. at 10.

exclusively toward those changes that inaugurate *new* discriminatory practices destructive of gains already achieved in minority political participation, not at changes leaving the situation essentially as it was.[62] In my view, the fact that the two new council seats are numbered posts "can hardly have the 'effect' of diluting or abridging the right to vote . . . within the meaning of § 5."[63]

C. *The Staggered Terms*:

As mentioned previously, there is also objection to the home-rule charter's inauguration of staggered terms. This is a concomitant of the charter's mandate for elections of the city's two new council members in odd-numbered years rather than at the same time its three other officers are chosen. In condemning these facets of the charter, my colleagues speak of the "synergistic discriminatory effect" of the two new numbered posts conjoined with the provision for staggered terms.[64] I have already explained my thesis that numbering of the two new council seats is not a procedure that could lead to a retrogression of minority voting power in Lockhart.[65] The question now is whether the staggering, in pairs, of the terms of those occupying the old and the new seats on the city's governing body will have the effect—either alone or together with the

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[62] See *Beer v. United States, supra* note 1, 425 U.S. at 140-141, 96 S.Ct. at 1363-1364, 47 L.Ed.2d at 638-639.

[63] *Beer v. United States, supra* note 1, 425 U.S. at 141, 96 S.Ct. at 1364, 47 L.Ed.2d at 639.

[64] Maj. Op. at 11.

[65] See Part II (B) *supra*.

numbering of those seats—of decreasing the "ability of minority groups to participate in the political process and to elect their choices to office."[66] I conclude that in Lockhart's circumstances it will not.

I would agree that a municipality changing from (a) an at-large election every year to fill four unnumbered council seats to (b) an election every year to fill two of the seats could not preclear under Section 5 because the halving of opportunity for single-shot voting would correspondingly diminish the voting power of minorities.[67] But that is not the situation here, for Lockhart has never had more than two non-mayoral seats as objects in any election. The only change the charter will make is the holding of elections in odd-numbered years for the two new numbered seats on the council. When contrasted with the pre-charter elections biennially to fill the only two numbered seats on the city's governing body, it becomes immediately apparent that all that will occur is repetition of the pre-charter process of choosing two members—now every year instead of every other year. Put another way, each councilmanic election in Lockhart would involve two numbered seats just as before, the only difference being that elections will occur annually rather than biennially.

To be sure, Lockhart's new charter does not enable minorities to cast single-shot votes and thereby increase their influence at the polls.[68] But it is too late

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[66] *Beer v. United States, supra* note 1, 425 U.S. at 141, 96 S.Ct. at 1363, 47 L.Ed.2d at 639.

[67] See Part II(B) *supra.*

[68] See Part II(B) *supra.*

in the day to contend that the Voting Rights Act requires the city to find and implement ways to maximize the political strength or representation of its minority citizens.[69] The pivotal consideration here is that while minorities cannot—because council seats are numbered—resort to single-shot balloting in councilmanic elections, the stark fact is that they never could, for the non-mayoral seats have always been numbered. And it seems obvious that the charter provision for elections to the two new council seats in odd-numbered years—and its accompaniment, the staggering of terms—will tend no more to highlight racial identities of candidates for those seats than did the pre-charter practice of filling the two original seats through elections in even-numbered years. The election procedures for both pairs of seats are identical, and no diminution in minority voting power is discernible.

Under the binding authority of *Beer*, then, I conclude that the numbered-post and staggered-term features of Lockhart's proposed scheme of councilmanic elections will not have the effect of denying or abridging the right to vote within the proscription of Sec-

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[69] See, *e.g.*, *Beer v. United States*, *supra* note 1, 425 U.S. at 141, 96 S.Ct. at 1363-1364, 47 L.Ed.2d at 639; *City of Richmond v. United States*, 422 U.S. 358, 370-372, 95 S.Ct. 2296, 2303-2304, 45 LEd.2d 245, 256-257 (1975); *Gilbert v. Sterrett*, 509 F.2d 1389, 1394 (5th Cir.), *cert. denied*, 423 U.S. 951, 96 S.Ct. 373, 46 L.Ed.2d 288 (1975); *Cousins v. City Council of the City of Chicago*, 503 F.2d 912, 920 (7th Cir. 1974), *cert. denied sub nom. Rayner v. City Council of City of Chicago*, 420 U.S. 992, 95 S.Ct. 1429, 43 L.Ed.2d 674 (1975); *Turner v. McKeithen*, 490 F.2d 191, 197 (5th Cir. 1973).

tion 5.[70] Accordingly, I would not deny Section 5 preclearance on the basis of either. Rather, since we bifurcated the trial of this case[71]—limiting the evidence to the effect of the contested charter provisions on the voting power of Lockhart minorities—I would reopen the proceedings to afford the parties the opportunity to submit additional evidence bearing upon the question whether the city may have had a discriminatory purpose in adopting them.

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[70] I am mindful that even "an ameliorative new" voting procedure will "violate §5 [if] the new [procedure] itself so discriminates on the basis of race or color as to violate the Constitution." *Beer v. United States, supra* note 1, 425 U.S. at 141, 96 S.Ct. at 1364, 47 L.Ed.2d at 639. See also *id.* at 142 n.14, 96 S.Ct. at 1364 n.14, 47 L.Ed.2d at 640 n.14. No one has suggested in this litigation that either the numbered council seats or the staggered terms of members could accomplish so much.

[71] See note 37 *supra*.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF LOCKHART,
Plaintiffs,

v.

UNITED STATES
OF AMERICA,
et al.,
Defendants.

Civil Action No. 80-364

ORDER

Upon consideration of the trial in this matter, and the entire record herein, it is, for the reasons set forth in the accompanying memorandum opinion, this 30th day of July, 1981.

ORDERED that plaintiff's request for a declartory judgment be and hereby is denied, and it is further

ORDERED that this action be and hereby is dismissed.

For the Court.

/S/
JOHN H. PRATT

/S/
JUNE L. GREEN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF LOCKHART,
Plaintiffs,

v.

UNITED STATES
OF AMERICA,
et al.,
Defendants.

Civil Action No. 80-364

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the City of Lockhart, the Plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order denying Plaintiff's request for a declaratory judgment, entered in this action on July 30, 1981.

This appeal is taken pursuant to 42 U.S.C.A. §1973c (Supp. 1980).

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I hereby certify that a true copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed, postage prepaid, this 22nd day of September, 1981, to the following:

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Supplemental Brief

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No. 81-802

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

City of Lockhart,
Appellant

v.

United States of America
and
Alfred Cano,
Appellees

On Appeal From the United States
District Court of the District of Columbia

APPELLANT'S SUPPLEMENTAL MEMORANDUM

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IN THE SUPREME COURT OF

THE UNITED STATES

CITY OF LOCKHART,

Appellant

vs.

UNITED STATES OF AMERCIA

and

ALFRED CANO,

Appellees

On Appeal From the United States District Court For The District of Columbia

APPELLANT'S SUPPLEMENTAL MEMORANDUM

Basis For This Supplemental Memorandum

Following the filing of Appellant's Jurisdictional Statement in this cause, responses were filed on beh .f of the Intervenor-Appellee Alfred Cano and by the Defendant-Appellee United States of America. The City of Lockhart in filing its Jurisdictional Statement had requested

that probable jurisdiction be noted and that the case be set for oral argument (Juris. Stmt. p. 16). Intervenor's position is that the case should be summarily affirmed (Intervenor's Motion to Affirm, p. 30). The United States does not urge that the decision below be affirmed, but requests that the decision below be vacated, and the case "remanded for further proceedings on the issue of discriminatory purpose." (Memorandum for the United States, p. 12). Thus, although the City of Lockhart and the United States agree that the district court erred in its findings regarding the question of discriminatory effect, they appear to be requesting different forms of relief from this Court.

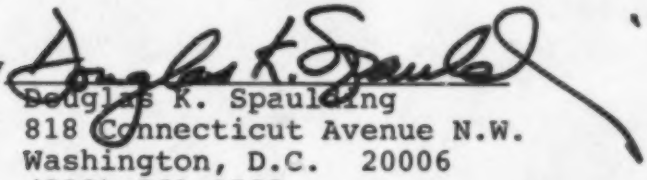
Appellant's Position Regarding Vacation of Judgment Below

The City of Lockhart hopes to resolve the issues presented in this case as expeditiously and economically as possible. It therefore joins with the United States and requests that the district court's judgment be vacated and that the case be remanded for further proceedings limited to the question of discriminatory intent

only. In the alternative, the City of Lockhart would request that probable jurisdiction be noted and the case set for oral argument.

Respectfully Submitted,

BAKER & HOSTETLER

By 

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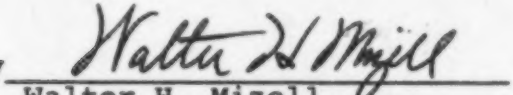
By 

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Joint Appendix

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No. 81-802

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF LOCKHART, *Appellant*,
v.
UNITED STATES and ALFRED CANO, *Appellees*.

On Appeal From The United States District Court For The District Of Columbia

JOINT APPENDIX

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Appeal Docketed October 28, 1981
Probable Jurisdiction Noted March 1, 1982

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Defendant's Exhibit No. 2, Tables(3) 77a

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Defendant's Exhibit Nos. 5(a)-5(b), Graphs 81a

Defendant's Exhibit No. 15, Table 85a

The following Memorandum Opinion and Order have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement (A.Jur.S.):

Memorandum Opinion of District Court, Dated July 30, 1981 ..... A.Jur.S. 2a

Order of District Court, Denying Plaintiff's Request for Declaratory Judgment, and Dismissing Complaint, Dated July 30, 1981 ..... A.Jur.S. 38a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Feb. 6, 1980 — Complaint of Plaintiff City of Lockhart and Plaintiff's Request for Three-Judge Court.

Feb. 28, 1980 — Designation of Judges to Serve on Three-Judge District Court.

Apr. 7, 1980 — Answer of Defendant United States.

Apr. 21, 1980 — Motion to Intervene and Answer in Intervention of Defendant-Intervenor Alfred Cano.

May 9, 1980 — Order Allowing Defendant Cano to Intervene as Party Defendant.

June 23, 1980 — Plaintiff's Motion for Summary Judgment.

July 8, 1980 — Defendant-Intervenor Cano's Opposition to Plaintiff's Motion for Summary Judgment.

July 11, 1980 — Supplemental Memorandum of Defendant-Intervenor in Opposition to Plaintiff's Motion for Summary Judgment.

July 14, 1980 — Response by Defendant United States to Plaintiff's Motion for Summary Judgment.

July 21, 1980 — Plaintiff's Pretrial Statement.

July 21, 1980 — Plaintiff's Supplemental Memorandum in Support of Motion for Summary Judgment.

Aug. 4, 1980 — Order Denying Plaintiff's Motion for Summary Judgment.

Aug. 21, 1980 — Defendant-Intervenor's Memorandum to the Court.

Sep. 5, 1980 — Motion of Plaintiff for Pretrial Clarification of Issues.

Sep. 10, 1980 — Trial commenced before Three-Judge Court.

Oct. 28, 1980 — Plaintiff's Trial Brief.

Oct. 28, 1980 — Defendant-Intervenor's Post-Trial Brief.

Oct. 28, 1980 — Defendant United States' Post-Trial Brief.

Nov. 5, 1980 — Plaintiff's Post-Trial Reply Brief.

July 31, 1981 — Memorandum Opinion of District Court.

July 31, 1981 — Order of the District Court, Denying Plaintiff's Request for Declaratory Judgment, and Dismissing Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF LOCKHART,
Plaintiff,

v.

UNITED STATES OF AMERICA, and
Defendant,

ALFRED F. CANO,
Defendant-Intervenor.

Civil Action
No. 80-0364

MOTION TO INTERVENE

I. Intervention Of Right

Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, Intervenor ALFRED F. CANO, a Mexican American voting age citizen of the United States, moves for leave to intervene as of right as a party Defendant in order to protect his interests and the interests of the class he seeks to represent. Intervenor has an interest relating to the transaction which is the subject of this litigation and is so situated that a disposition of this action may as a practical matter impair and impede his ability to protect those interests not adequately represented by existing parties.

1. Intervenor Cano is a Mexican American citizen of the United States residing and registered to vote in the City of Lockhart, Texas. He is a member of a language minority group protected by the Voting Rights Act of 1965, as amended. 42 U.S.C. § 1973 b (f) (2) & c.

2. This Intervenor has a substantial interest in the outcome of this litigation, since by this action the City of Lockhart seeks to validate a standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1972. This change has the purpose and effect of denying or abridging the right to

vote of racial and language minority groups on account or race or color and in contravention of the guarantees set forth in 42 U.S.C. § 1973 b (f) (2).

3. Grant of the declaratory relief sought by the City of Lockhart, Texas, in this case will as a practical matter impair and impede Intervenor's ability to protect his right to vote.

4. Neither the City of Lockhart nor the United States completely and adequately protects the interests of the Mexican American Intervenor.

5. Intervenor's motion is timely brought to protect his interest without undue delay or prejudice to the existing parties.

WHEREFORE, Intervenor, individually and on behalf of the class he represents, requests this court to allow him intervention as of right as party Defendant and file the attached Answer.

II. Permissive Intervention

Alternatively, pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, Intervenor Cano moves this court for leave to intervene permissively as party Defendant on the grounds that he has a common interest relating to the claims forming the basis of this action.

1. Intervenor hereby incorporates by reference Paragraph 1 through 4 of this motion.

2. Intervenor's motion is timely brought to protect his interests without undue delay or prejudice to existing parties.

WHEREFORE, Intervenor individually and on behalf of the class he represents requests this court to allow him to intervene permissively

as party Defendant in this cause of action and file the attached Answer.

Dated:

Respectfully submitted,

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/s/ RICHARD S. KOHN
Richard S. Kohn
Attorneys For Defendant-Intervenor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANSWER IN INTERVENTION

In answer to the Complaint filed by the City of Lockhart, Caldwell County, Texas, Defendant-Intervenor Alfred F. Cano, Mexican American voter and resident of the City of Lockhart, responds and alleges as follows on behalf of himself and all others similarly situated.

I.

Defendant-Intervenor admits the allegations contained in Paragraphs 1, 2, 3, 4, 5 and 6.

II.

Defendant-Intervenor denies the allegation set forth in Paragraph 7 and alleges that the election change in question here provided for an at-large election scheme, which includes the use of staggered terms and numbered places, two additional council persons and a change in the form of government.

III.

Defendant-Intervenor denies the allegation set forth in Paragraph 8 and alleges that the at-large, by place, staggered term election scheme does not enhance the position of racial and language minorities with respect to their effective exercise of electoral franchise and has the purpose and effect of denying and abridging their right to vote on account of race or color, or in contravention of the guarantees set forth in 42 U.S.C. § 1973 b (f) (2).

IV.

Defendant-Intervenor further denies Paragraphs Nos. 1 and 2 listed on page 2 and 3 of Plaintiffs' Complaint.

V.

Affirmative Defense

Defendant-Intervenor further alleges that the Plaintiffs are estopped from alleging that the adoption of the Home Rule Charter by the City of Lockhart on February 20, 1973, did not constitute a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972. Said estoppel is based on the principle of res judicata, said issue having been resolved contrary to Plaintiff's allegations herein, by the United States District Court for the Western District of Texas in a proceeding in which Plaintiffs herein were parties. *Cano* v. *Chesser*, Civ. Act. No. A-79-CA-0032 (W.D. Tex. 1979) (Order of Honorable Judge Jack Roberts dated March 2, 1979).

VI.

Affirmative Defense

Defendant-Intervenor further alleges that the grant of declaratory judgment for Plaintiffs would operate to deny them rights guaranteed by the Voting Rights Act and the United States Constitution. He further alleges that his interests are not adequately represented by other parties to this litigation.

VII.

Intervenor, Mexican American voter and resident of the City of Lockhart, seeks to represent all others similarly situated. To this end, he answers the Complaint on his own behalf and on behalf of all others similarly situated pursuant to Rule 23 (b)(1)(A) & (B) and 23 (b)(2) of the Federal Rules of Civil Procedure. The Defendant class is composed of all Mexican American citizens of the United States of voting age residing in the City of Lockhart, Caldwell County, Texas.

(a) The Intervenor is a Mexican American citizen of the United States residing within the City of Lockhart, Caldwell County, Texas and is a registered voter.

(b) The class is so numerous that joinder of all members is impracticable.

(c) There are questions of law and fact common to the class.

(d) The claims of the representative Intervenor are typical of the claims of the class.

(e) Intervenor is capable of and will provide fair and adequate representation for the class.

(f) The Plaintiff, City of Lockhart, Caldwell County, Texas, has acted and may act on grounds generally applicable to the class, thereby making appropriate final relief with respect to the class as a whole.

VIII.

WHEREFORE, Defendant-Intervenor, on behalf of himself and all others similarly situated, requests that this Court:

(a) Protect their rights and interests by allowing their intervention as a party to this action;

(b) Deny Plaintiff's request for Declaratory Relief;

(c) Award Defendant-Intervenor the costs of this litigation including reasonable attorneys' fees; and

(d) Grant such other relief as it deems judge and proper.

Dated:

Respectfully submitted,

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Attorneys For Defendant-Intervenor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANSWER OF DEFENDANT UNITED STATES

The United States of America in answer to the complaint filed herein states:

1. Defendant admits the allegations contained in paragraphs 1-4.

2. Defendant admits the charter commission was composed of fifteen members but lacks knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations in paragraph 5.

3. Defendant admits the allegations contained in paragraph 6.

4. Defendant admits that the changes described in paragraph 7 occurred as a result of the adoption of the Home Rule Charter but deny that these were the only changes occasioned by the adoption of the Home Rule Charter. Defendant avers that the Home Rule Charter changed the form of government in the City of Lockhart by increasing the power of the governing body and establishing new duties and responsibilities for the city government.

5. Defendant denies the allegations contained in paragraph 8.

Respectfully submitted,

CHARLES F. C. RUFF
United States Attorney

DREW S. DAYS III
Assistant Attorney General

/s/ ROBERT S. BERMAN
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DEPOSITION OF FREDERICK A. CERVANTES

* * * *

Direct Examination By Mr. Mizell:

* * * *

[18] Q. Based on what analysis you've done and any other material that you have at your disposal, have you come to a conclusion with regard to the impact of adoption of the — the new form of government when the charter was adopted as opposed to the form of government that adopt — that was in use before on Mexican-Americans in Lockhart?

A. Well, I have — I really have no firm conclusion yet. As I've indicated, I — I've — I would like to look more closely and relook at the — at the information to see if something that I'm [19] missing can be discerned.

At this point, I see no — no substantial difference in terms of the two systems, because as far as I can conclude at this point, the salient characteristic of that electoral system, both prior to the change in — and after it, is the at large —

Q. Yes.

A. — feature, which evidence indicates from a number of sources tends to dilute minority voting, particularly in polarized voting situations.

Q. In terms of — of just looking at what existed before and what existed after and putting to the side your understanding of the impact of single member districts —

A. Uh-huh.

Q. — as opposed to at large, and just focusing strictly on the at large system as it existed before and the at large system as it existed afterwards, did it have any impact at all, positive negative, on the possibility for electing a Mexican-American candidate in Lockhart —

A. Well, the —

Q. — in your opinion? And now I ask you that, and I'll ask you in answering that to put [20]aside what you know —

A. About the —

Q. — of history since that time and talk about theoretically.

A. Strictly theoretically?

Q. Yes.

A. Well, the one possible difference or one possible distinction that would make a difference, it would seem to me, would be the increase in the number of council seats.

However, I think because the number is still relatively small, it is probably not too reasonable to assume that that would make a very significant difference, the reason being that what studies we do have regarding the increase of council — number of council seats is based on large scale aggregate analysis, and as has been suggested in previous testimony there is a difference in terms of giving up certain — or redividing a portion of the total council in terms of fourths or thirds as opposed to increasing size, let's say, up to 1920.

In other words, if there had been a significant jump in the number of council seats from three to, let's say, six or nine, I would suppose it — that the factor that seems to sometimes take place, [21]that the courts have referred to as the benevolent white majority, deciding to elect a minority would have been more likely. It would have been greater.

That is, as you asked, looking at this theoretically, without — and ignoring what actually happened —

Q. Well, and I still want to do that just for another moment, and then we'll go and look at it another way if you would like to.

A. Right.

Q. But I understand you to be saying that this appears to have been a step in the right direction, but maybe not enough to have made any difference. Is that what you're saying?

A. That's — I think that is a — that is a fair assessment, yes, of what I'm saying. However, we have agreed in our hypothetical example to exclude any consideration of single member district –

Q. Yes, sir.

A. — possible. Right.

Q. I'm not asking you to —

A. Right.

Q. — interject that at this point.

A. Right.

Q. Now, I said I would give you a chance to [22] now talk about it in terms of what you know has happened since by virtue of the election.

Is there anything that has happened since 1973 when the charter was adopted, that would cause you to believe that this step, albeit very small in the right direction, was, in fact, not any different at all or was a step backwards?

A. Well, I would not argue that it was a step backwards. But the important event, I suppose, to consider in relation to all this is the election of Mr. Rangel to the city council in 1978.

And the thing that becomes apparent in looking at the numbers in that election is that, of course, Mr. Rangel was elected because in addition to it being an at large system, it's also a plurality system.

And he apparently ran against two or three, as I recall, specifically two, but depending on what you regard as significant numbers, three relatively vote — good vote-getting Anglo candidates, who split a substantial number of votes that, taken together, would have overwhelmingly defeated Mr. Rangel.

Now, what — Well, I would only add that one cannot speculate too much further in the [23]absence of any sort of a — of a run-off.

Q. Yes, sir. And — and, of course, the run-off is not required under the system, either before or after?

A. That's right. That's right.

Q. Are you aware of the fact that Mr. Rangel believes that even if he'd just run against one, the strongest candidate there, he still would have won?

A. No, I'm not.

Q. Does that surprise you?

A. Somewhat, yes. I must admit it because the interesting thing I found about Mr. Rangel's total is that it correlated with the — significantly with the hand-count that was done at the Spanish surnamed voters in that election.

Q. Okay.

A. But, again, as we discussed earlier, one cannot pin that down.

Q. We would speculate if we say he would win, as much as we speculate if we were to conclude he would lose, is that not so?

A. I'm sorry, I don't understand.

Q. I'm — either way, whether we talk about him winning or whether we talk about him losing in a run-off, we are speculating as to what would happen?

[24] A. That's true.

Q. Do you have any — any feel for the — the staggered term feature that was present after the enlargement of the city council in terms of whether or not it had any impact?

A. I have no — no strong feelings for that. There is evidence, I think, that was presented in the previous deposition, that deserves consideration, suggesting that staggered terms reduce voter turnout.

And one of the things that we find in political science, I think, generally, is that low voter turnout does not tend to benefit minority candidates or minority voters, especially where polarization exists. But I — I feel —

Q. Would — it would allow election by ambush, though, would it not?

A. I'm not sure I know what that means, except —

Q. I just made it up, but I think you know what I mean. Sort of like McGovern did in the —

A. Well, if you had — Yes, if you had an incredible sort of mobilization, that is hard to imagine in these days among voters.

* * * *

DEPOSITION OF RILEY E. FLETCHER

* * * *

Direct Examination By Mr. Hancock:

* * * *

[14] Q. Okay. Is there any necessary implication that would allow the use of numbered posts?

A. I don't find any.

Q. Now, you mentioned earlier that the home-rule cities have more authority than the general-law cities. Could you explain in more detail what you mean by that?

A. There are things which a home-rule city may do which a general-law city has no authority to do. An example would be the adoption of — through the charter of the initiative, the referendum and the recall, which is not found in the statutes at all in Texas. They can choose the form of government that they want. And we find several variations.

* * * *

Q Let me just interrupt for a moment, sir.

A. Uh-huh.

Q. When — If a city switches to — becomes a home-rule city, are they required to adopt a form

[16] Q. Is there a difference between the commission form of government and the council manager form of government?

[17] A. The council manager form of government — and let's say — Are you talking about the general-law cities under the commission form of government?

Q. Well, between, say, a commission form of government in a general-law city and a council manager form of government in a home-rule city.

A. Yes, there would be differences there.

Q. Is a general-law city authorized to annex land without the consent of the people?

A. The only land that a general-law city may annex without the consent of the voters, if there are three or more living on the land to be annexed or of the landowners, if there are less than three voters living on the land, in the case where the city annexes land which belongs to the city. There is no one to ask but themselves then. That's found under Article 965 as authority.

Q. But if there was an area outside of the city, say, where a number of people live and they don t want to become a part of the city, does the city — does the general-law city have authority to annex such area to the city?

A. They have authority to annex people who do not desire to be annexed by a majority of the voters, which means, then, there may be some disappointed [18] people who are drug along with the majority.

Q. The majority of the people in the area?

A. In the area to be annexed, yes.

Q. Well, how does the authority — Let me ask it to you this way: How does the authority of a home-rule city differ from the authority of a general-law city in regard to ability to annex areas?

A. The power of annexation is not spelled out for a home-rule city in the statutes, except that in Article 1175, Subdivision 2, of Vernon's Texas Civil Statutes, which says a home-rule city may annex land in accordance with the provisions of its charter, subject only to such procedural rules as may be found in the Municipal

Annexation Act. Therefore, most home-rule cities have written into their charters the power to annex territory lying adjacent to the city. And the language may go something like this: The city council may, by ordinance, annex territory lying adjacent to the city with or without the consent of the owners or inhabitants thereof and subject only to such procedural rules as may be prescribed by law.

* * * *

Cross Examination By Mr. Mizell:

* * * *

[33] Q. During the time we've been off the record, Mr. Fletcher, you and I and the others have looked through the various statutes we have at hand and come up with Article 1158 which comes from the supplement, I believe, in Volume II-A.

A. II-B.

Q. II-B. Okay.

A. II-B of Vernon's Texas Civil Statutes.

Q. All right. Now, is that the statute which gives us all that we can find out about the operation of elections for commissioners in general-law cities?

A. I'm sure you're not discussing procedure about filing for office and that sort of thing.

Q. I'm talking about —

A. That's the Texas Election Code.

[34] Q. I'm talking about the form —

A. Of the government.

Q. — of the government.

A. That's all I find.

Q. Now, from that — First of all, there is nothing in there that tells you to use either single-member districts or pure at-large or numbered posts or staggered terms or not staggered terms, is there?

A. No.

Q. There is nothing in there that a person in the City of Lockhart reading that could see that would tell him that if they were using the numbered-posts at-large system that what they're doing is contrary to state law? You've got to pick one system.

A. Unless he was an attorney and familiar with the rule about general-law cities, you know, performing those things that are specifically authorized or by necessary implication. And he doesn't find it authorized; and then the question comes to whether it was implied or not.

Q. Well, what — There isn't any specific form of government —

A. No.

Q. — authorized there.

[35] A. Other than a mayor and two commissioners.

* * * *

DEPOSITION OF BERNARD RANGEL

* * * *

Direct Examination By Mr. Berman:

* * * *

[19] Q. What leads you to believe that your status as a plaintiff may have contributed in some way to winning at the polls?

A. The idea that if I was successful I would drop off as plaintiff in the lawsuit and being that it was one of the first questions that was asked of me right after I was elected in '78.

Q. Do you recall who asked you that question?

A. No, sir. It was — I know it was the editor to the paper.

Q. Did it happen — Was that question asked you more than once or by different people?

A. Yes, sir, it was.

Q. You said that one of the purposes of the lawsuit you felt in 1977 was to seek a change in the method of electing members to city council. Why do you feel that is an important objective?

A. That's — To me, that's the only guaranteed way that the Mexican-Americans in Lockhart have of having representation in the city council.

[20] Q. Do you feel that at this point being a Mexican-American and serving on the council that you were providing some representation to the Mexican-American community?

A. Yes, sir, I am.

Q. In that capacity as providing representation, do you feel that that representation would be enhanced by single-member districts or single-member district system of election?

A. I didn't understand the question.

Q. Okay. Do you feel that the single-member district system would provide a better voice for the Mexican-American community than the current system is doing?

A. Yes, sir, it would.

Q. In looking at the current system and the new form of government that the city charter adopted, if you could break it down into segments for a second, you've examined the at-large system of voting as opposed to single-member direct system of voting. How does the at-large system adversely affect the minority community, just briefly?

A. I don't understand you.

Q. In other words, as plaintiff in the lawsuit, you are attempting to obtain single-member [21]districts?

A. Yes, sir.

Q. And in the same light you are also trying to replace the at-large system with the single-member district system.

A. (Nod affirmative.)

Q. How does the at large system hurt the Chicano community. In other words, what is it about the system that makes is a burden?

A. At the present time, being that I'm the only Mexican-American on there, they feel more comfortable just talking to me as to where if there was a single-member districts, the possibility of Mexican-Americans on the council would be two, possibly a third one.

The communication — just a simple communication would be greater than what it is now.

Q. Could Mexican-Americans elect three council members under the at-large system?

A. No, sir.

Q. Why not?

A. There has never been a city council raised where there has been a Mexican-American running against an Anglo one on one in the City of Lockhart. If there has been, a Mexican-American has always [22]been defeated.

If we were to have elections today, we would still lose that election.

Q. The charter also provided that council members and the mayor would be elected on what they call staggered terms. In other words, two council members and the mayor elected at one time; the following year, two council members.

Does that provision have an adverse impact on the Chicano community?

A. Well, the idea that I have always taken is that when you have a staggered terms like that, you are going up against the best every time. And whether it is mentally or black and white, you are going to get defeated.

Q. And the numbered-post provision, what effect does that have on the minority community?

A. Well, you have a — you have a Mexican-American that files early for that certain, say, Place 1. You also — the political system is still going to throw you the best, and I guess that one possibility of having the others file will not be there.

Q. You tend to get sort of targeted, then, in other words?

[23] A. Right.

Q. Can you think of any reason why the city wants to keep the at-large system?

A. Well, I don't think the present city council — some of us that are on the city council right now want to get off. Others would not want to see anybody else on there.

Q. By "not seeing anybody else on there," could you explain at that?

A. Well, I know in collaborations that we've had we've talked about going back to the three-man council, mayor and two commissioners. And the idea that — the statement that always keeps in my mind is Mayor Chesser's thinking that, "What about if all five of us were replaced at one time, how it would be unfair for the citizens of Lockhart to put five new people in office."

And that's fine, but it's being a little greedy. We've got a city manager, we've got a city attorney that can help us run the city.

When I got elected, I didn't know how everything ran or how the water ran behind closed doors; but I've learned. It's more of a principle thing now of keeping the at-large system than of hurting the citizens.

[24] Q. Would that reasoning also extend to staggering the terms and to the numbered-post system as more of a principle thing, rather than — and you — any interest that the city has in maintaining that? Just your feeling; that's all I can ask.

A. I don't know.

Q. Can you think of any reason why the city wants to keep staggered terms?

A. No, sir, I sure don't.

Q. I've asked you at large. Numbered posts?

A. Targeted? It would be an easy target —

Q. It would be a way to target the minority candidates.

A. Sure.

MR. BERMAN: Just one minute, please.

(At this time there was a brief discussion off the record.)

MR. BERMAN: I have no further questions.

* * * *

Cross Examination By Mr. Avila:

* * * *

[28] Q. When the charter was being considered in 1973 and the charter election was held, do you recall whether or not you were pleased to see the charter being proposed or whether or not you were opposed to it or anything else about it?

A. I don't recall taking any interest in it at all, sir.

Q. Do you remember whether you even voted for or against it?

A. No, sir, I don't.

Q. You are aware, of course, that the charter did enlarge the council?

A. Yes, sir.

Q. And, in fact, it was that reason, the enlarged city council that encouraged you to file a candidacy in 1973, was it not?

A. Yes, sir.

Q. Is is fair to say that you believed that having a larger number of potential slots on the council would increase your chances of a successful candidacy?

A. No, sir.

Q. I [*sic.*] didn't think that having the charter would increase your chance of being elected?

A. No, sir.

[29] Q. Have you ever made any statement inconsistent with that, Bernie?

A. The only thing I can recall is that there was a place and I was running for it, not that it was going to guarantee me a spot on the council.

Q. Oh, I didn't say "guarantee." I said increase your chances of election as a Mexican-American on the council?

A. I still don't understand the question.

Q. Do you think that having a larger council — First of all, you said that the larger council was the thing that encouraged — that caused you to seek a slot on the council; isn't that right?

A. Yes, sir.

Q. And didn't you think that at the time that having a larger council would increase your chances of being elected to the council?

A. Yes, sir.

Q. Okay. You ran against Marie Burton?

A. Yes, sir.

Q. And Marie Burton was a pretty strong candidate, was she not?

A. Yes, sir, she was.

Q. She was well known in the community?

A. Yes, sir.

* * * *

Cross Examination By Mr. Mizell:

* * * *

[46] Q. Okay. Do you happen to remember whether Mr. Kirksey or Mr. Ohlendorf made any effort to reach out and obtain the support of Mexican-American candidates in '72?

A. I don't know, sir.

Q. How about Hartzog down in '74, Hartzog versus Burchill and Heath? Do you remember anything about Mr. Hartzog or Mr. Burchill?

A. No, sir, I don't.

Q. Okay. Do you feel that it would be a — it would have an adverse impact for the Mexican-Americans in Lockhart if the city government were to go back to a mayor and two commissioners under the commission form of government?

A. Yes, sir, it would.

Q. What is your position with regard to the pure at-large system where you do away with the numbered posts and everybody runs in a pot. Do you — Have you discussed that with anybody in the last few weeks?

A. I dislike the plan, sir.

Q You dislike the plan?

A. Yes, sir, I do.

* * * *

Redirect Examination By Mr. Berman:

* * * *

[72] Q. You stated that one of the reasons why you ran for city council is that the larger council might be a factor in your success.

Why is a large — Why was it important that there be now five seats of four seats and the mayor open for election rather than merely two commissioners and the mayor?

A. Well, it just — To the best I can answer myself is that it just created another — another slot that was there to be filled, and took my chances at getting in there.

* * * *

[86] Q. Okay. In 1978 you were running head-on-head with Mr. McKinney who, I believe, was the second vote getter, who asked you to become a predictor rather than a politician. Who would have won?

A. Between myself and McKinney?

Q. Right.

A. I would have taken it.

Q. Think you — think you would have beaten him?

A. Yes, sir.

MR. BERMAN: I have no other questions.

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TRANSCRIPT OF EVIDENCE ADDUCED AT TRIAL IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Appearances:

WALTER H. MIZELL, ESQ. and
DOUGLAS K. SPAULDING, ESQ.
For the Plaintiff,

ROBERT S. BERMAN, ESQ. and
JOSE GARZA, ESQ.
For the Defendants.

Testimony Of Warren P. Kirksey
Direct Examination By Mr. Mizell:

* * * *

[34] Q. How did the other members of the commission react [35] to your proposals or suggestions regarding a city charter?

A. We all came to agreement on that in 1972 that we would take steps to study officially and educate the public as to the home rule charter.

Q. In order to bring a charter into being, what was the first step that you did?

A. We had study sessions and public meetings, publicized it throughout the community, had Mr. Reilly Fletcher come down to explain the procedure for adopting a charter —

Q. Before you go any further, would you identify for the Court who Reilly Fletcher is?

A. Yes, sir. He was legal counsel for the Texas Municipal League.

Q. And tell us what he did then?

A. Yes, sir. He explained to the group, the city commission at that time and the citizen group, the advantages, differences between the two forms of government, the possible advantages, went into a possible procedure that you could follow in educating the people and obtaining a home rule charter.

Q. At that meeting, did he tell you anything about the impropriety of the system under use in Lockhart at the time?

A. No, sir.

Q. Did he give you any hint or indication that he thought you all were doing anything wrong at that time?

TESTIMONY OF DELBERT A. TAEBEL

Direct Examination By Mr. Mizell:

* * *

[72] Q. What was the idea? What were you trying to figure out?

A. We were trying to see whether — we were looking at two electoral structures: the size of the council and single member districts or the type of election — single member districts or at large and see if either had an impact on the equity of representation.

In other words, we wanted to know if one was bad and one was good in terms of equity of representation by minorities.

Q. Were you able to make any conclusions based upon your data regarding the impact of enlarging a city's governing body on the representation of Mexican-Americans or other minorities?

A. Yes, we were.

Q. What was that conclusion?

A. That conclusion was that by increasing the size of the city council, you enhance the electability of minorities, especially Hispanics.

Q. Now, is that in the context of an at large election system?

A. Yes. Even in an at large system you enhance the electability of minorities.

* * *

[76] Q. Dr. Taebel, were you able to review the situation, after the adoption of the charter in Lockhart, in the context of your findings and make any determination with respect to the adoption of the charter as to its impact, positive, negative or otherwise, on the electability of a minority candidate in Lockhart?

A. Well, one was elected. One minority candidate was elected.

Q. I am asking you, though, in terms of the abstracts, in terms of the study that you did an in terms of political theory and your background and study —

A. In my judgment —

Q. — were you able to form a conclusion based upon all that as to whether or not the changes brought about by the charter, the numbered places as the Court has pointed out — Excuse me, the larger — the larger charter, the larger commission and the staggered terms, did they have any impact?

JUDGE ROBINSON: The larger council, I think you mean.

MR. MIZELL: Your Honor, I get tongue tied on this and I apologize.

BY MR. MIZELL:

Q. I mean the larger governing body and the staggered [77] terms, did that have an impact?

A. I think the general impact of all of the changes was beneficial for the Chicanos in the city.

Q. Well, now, let's put the city generally to the side and talk about in terms about the electability of a minority, Mexican-American?

A. Well, that's what I meant. I think the changes that were adopted in the new charter in general benefitted or enhanced the electability of minorities in Lockhart.

Q. Now, prior to the adoption of the charter, the city commission was all elected at one time. Is that correct?

A. Yes.

Q. The mayor and two all in the same year.

A. Yes.

Q. After the imposition of the charter, you are aware that they had the off-year election for the additional two representatives?

A. That's correct.

* * *

Cross Examination By Mr. Berman:

* * *

[96] Q. What governmental interest is served by this numbered place or numbered post system?

A. Well, from a political science perspective? It probably generates a more direct head-to-head debate, which is one of the things that is a sort of value, I guess, in a democratic society. That is, if a candidate is vying with another candidate for a specific office, then the voter is informed or can be more informed of the viewpoints and ideas and issues that each candidate stands for.

Q. So it has the effect of spotlighting particular candidates. Is that correct?

A. And issues.

Q. And candidates.

A. I am talking about in a political science perspective it's the debate that is of value.

Q. But it also has the effect of spotlighting the particular candidates?

A. Yes, sir.

Q. Does numbered post also promote the idea of running against a particular person?

A. Yes, sir. You have an opponent. In fact, you call him an opponent — or her an opponent.

Q. And numbered places give you an opportunity to vote [97] against somebody?

A. Yes, sir.

Q. Are you aware that the Civil Rights Commission has found numbered posts to be a potentially discriminatory device?

A. No, sir.

Q. Are you aware the United States Congress had found numbered posts to be potentially discriminatory devices in elections?

A. No, sir.

Q. You are personally opposed to the use of staggered terms. Is that correct?

A. Yes, sir.

Q. Your study cites the fact of size as being a very determinative factor in the ability of minorities to be represented on councils. Is that correct?

A. I would not use the word very. It is of some importance, right.

Q. And you have classified the size of councils into three categories, small, medium and large?

A. In one chart, I have.

Q. Did you classify it into any other categories other than small, medium and large?

A. Yes, sir.

Q. Other than strictly numerically?

A. No, just strictly numerically.

* * *

Redirect Examination By Mr. Mizell:

* * *

[109] Q. I will ask you to assume that it was three before and it was enlarged to five by the addition of the two in the off-year election. And that is one alternative. And the other alternative would have been single member districts based upon some sort of scheme such as the one diagrammed a moment ago that you looked at.

Which of those, from the standpoint of enhancing the electability of a minority would you in your estimation believe to be the most favorable?

A. The single member district with the enlargement of the council.

Q. With enlargement of the council?

A. Right.

Q. All right. Does the fact that you believe that to be more favorable than the other cause you to believe that there is no enhancement factor from the changes that were in actuality made?

A. No, I think that the changes that were made enhanced the electability of minority candidates. I am only talking in terms of a relative degree here now. On a scale of 1 to 10, I would say single member districts would enhance it — maybe on a scale of 1 to 10, 5.

[110] With just the enlargement of the council, as before, I think I said 1.5 to 2, something like that.

Q. All right. Now, let's just isolate the staggered terms for a moment and see if we can get that clarified.

A. O.K.

Q. If you went from three to five, with the elections in the same year, in your opinion, as you have stated before, does that have an enhancing effect?

A. I don't — As I said before, I think its effect is very minimal and I don't know whether it's a positive or —

Q. Wait a second. Excuse me. I think you misunderstood my question.

A. O.K.

Q. I am talking about the enlargement factor here.

A. Oh, yes, the enlargement factor does have an enhancing effect.

Q. All right. Now, to get from enlargement only —

A. O.K.

Q. — to staggered term feature is where this question goes.

A. O.K.

Q. Does the fact that the two new places that they created were to be filled in an off-year election erase the enhancing effect of expansion of the governing body, in your opinion?

A. No.

[111] Q. With respect to the geographic concentration of minorities in Lockhart, which we stipulated to a moment ago, does the fact that that is established or agreed mean that the impact of enlarging the city council, the enhancing effect, is somehow negated or non-existent?

A. No.

Q. What does the fact that there is geographic concentration mean? Why is that, if it is, relevant?

A. Well, it might be relevant for two reasons. For the purpose of drawing single member districts in determining whether minorities could elect someone in that district. The other reason — might be important to some extent — is because it makes campaigning probably a little bit easier.

MR. MIZELL: All right.

I believe that's all I have, Your Honor.

* * *

TESTIMONY OF CHARLES L. COTRELL

Direct Examination By Mr. Berman:

* * *

[135] Q. Dr. Cotrell, at my direction, did you examine the home rule election and governance plan of the City of Lockhart?

A. You mean the charter that Lockhart adopted in 1973?

Q. That's correct.

A. Yes, I did.

Q. From the viewpoint of a political scientist, what do you consider to be the salient features of the plan?

A. Concerning selection or election?

[136] Q. Correct.

A. Yes. Well, the first thing that one would notice in Article 301 and even also in section — Article 5, I think it's Article 5, is the at large feature. That is, that persons are elected at large.

Secondly, another feature attached to that is the plurality system. They are elected by plurality not a majority.

And, finally, they are elected in a place — by numbered place. And, also, they are elected under staggered terms. Three persons, two council members and a mayor, are elected in even-numbered years and two places are elected in odd-numbered years.

Q. Taking these factors — Excuse me, let me back up. Can all these factors be parceled out and isolated in an analysis of the election system?

A. Can we speak of them as isolable parts of the election system? Yes, we can.

Q. Taking these factors one by one, starting with numbered places, would you briefly describe numbered places, exactly what they are?

A. The numbered place system has been talked about a lot in this courtroom today. But, fundamentally, it is an appendage of an at large system wherein candidates file for a numbered post and thereby run against each other. And the numbers of places could vary.

[137] And like any kind of electoral structure or any kind of electoral device, rules and law impacts behavior. So a numbered post and any other devices impacts upon behavior.

Q. What impact on behavior would a numbered post provision have?

A. Well, the first thing that you would see about a numbered post is that it arranges contests so that, basically, candidates run against each other, or as has been said in this courtroom today, head to head. That gives a certain visibility to the post position itself.

In that sense, also, and I think we must understand this about a number of these features, it in a sense impacts, depending on where you file, who runs against whom, and it impacts the arrangement of candidates that the voters have to choose from.

The voter then must vote for place one, place two, place three or place four, instead of voting for a group of candidates who are simply running at large. I think that system has been referred to as the pure at large system.

Q. Does the possibility of a pure at large system, does that give rise to — Excuse me, let me start again.

Under a pure at large system, is a person required to vote for as many candidates as there are offices? For instance, if there were four offices up for election, is a person required, under a pure at large system, to cast four votes?

[138] A. In some states. As you probably know, some states have made that requirement. But that is not a requirement, to my knowledge, in Texas, nor has the provision that a voter must cast ballots for all of the candidates in a non-numbered place, at large system, that is not a provision or practice in Texas.

Q. If a voter was to cast one or two votes rather than the full complement of four, is there a particular phrase given to that phenomenon?

A. Yes, we have talked about it here. Single-shot voting. And, basically, what that means is if there is a cognizable group in the electorate, you can give a leverage, an influence, because of the electoral features of the system, pure at large, you can gain an influence by voting for a candidate of your choice.

And then that same group of voters chooses to withhold their votes from the other candidates, thereby if a number of the voters in the system voted for all of the candidates, then that group that withheld their votes from, say — let's say there are five, withheld their votes from the other four, that would give a numerical advantage to the voting bloc or the voting cognizable group.

That kind of leverage has been referred to as single shot.

Q. Could you give a brief numerical example?

[139] A. Well, if you have, let's say, 10 positions — In fact, in my affidavit, I gave such an example.

Q. Sorry.

A. Let's say that the weight of the vote was you are electing three persons, or four persons, whatever, and the weight of one group's vote was four. And then the other votes that the voters cast are spread out among the other candidates. So what happens in the group getting four? What happens is they vote for just that candidate, and thereby diminish the votes received in a sense or at least the totals needed for election in a plurality system from the other candidates.

JUDGE GREEN: It's also referred to as the bullet ballot, isn't it?

THE WITNESS: Bullet ballot. Yes, Your Honor.

MR. BERMAN: Thank you.

BY MR. BERMAN:

Q. What would be the effect of a numbered post position on a single shot or a bullet ballot voting phenomenon?

A. It essentially nullifies the effects of a single shot voting, because the voter, to have an impact, casts a ballot for each numbered position, you see. And so withholding a vote from a numbered post would not have the numerical or mathematical advantage that you would have had in a pure at large plurality system.

I don't mean to make this — Mr. Berman, I don't mean [140] to make this self-evident, but you can go through all kinds of different situations where the single shot can impact in a pure at large plurality system.

Q. You said in a pure at large plurality system.

Would it make a difference if there is a majority vote requirement on that? To what extent would that change your —

A. Now we are changing the situation. As I understand, the question is to change from a plurality ballot type to a majority. What a majority system does is really allow for, in a sense, initial election skirmishes to take place in the first round.

So if you had three, four or five candidates, basically what it does is regroup the voters. In the second round the majority runoff round, it regroups them in a way pitting one person against another. So it is really a head-to-head kind of contest there.

Obviously, the visibility and salience which the voter perceives in a majority system is really very high.

Q. Thank you. Returning to a pure at large without the majority vote requirement, what would be the effect on my members of a minority community of imposing a numbered post provision in a pure at large system?

A. Well, on —

Q. Excuse me. I would like to assume, I think as we have agreed, that there is racial bloc voting.

[141] A. You want to assume there is racial bloc voting. And now you have a pure at large plurality system. And you have added to it the numbered post system.

Q. Correct.

A. What you have done then is in a sense regrouped the choices available to the voter. You have, as we have discussed earlier, stricken the possibility of single shot voting or the bullet ballot on the one hand, and you have increased the visibility — this is significant, you have increased the visibility — of the positions and the persons running in those positions.

You have focused the voters' attention, then, on the persons running against each other in places one, two, whatever. So those are two very real effects. And what you have done in the case of racial bloc voting is basically take away the single shot possibility on the one hand and then I think made it exceedingly more difficult for a minority person to file for and run head-to-head in a visible numbered position in the context of racial bloc voting.

Q. Is there any school of political thought that would agree with your analysis of the effect of numbered places on the political participation of members in a minority community?

A. Are there political scientists who concur?

Q. Yes.

[142] A. Yes. One such person, of course, would be Roy Young, who wrote the monograph that has been introduced into evidence in this case called "The Place System in Texas Elections." Another such person would be Clifton McCleskey, who was, I think the Dean of Texas Political Scientists until Cliff left us for Virginia not very long ago.

He has a very, very popular textbook "The Government and Politics of Texas," Sixth Edition, and he and his coauthors, who have continued that book in his absence, have cited the place system as having adverse effects on minority voters.

Of course, the Civil Rights Commission reports contained in the Voting Rights Act 10 years after, the conclusions there are based upon observations of the working of the place system in various jurisdictions.

Q. Are you aware of any governmental interest that is furthered by the adoption or the utilization of a numbered post provision?

A. Well, it's interesting that one of the few published things we have on the place system discusses this question, not in terms of governmental interest, but basically in terms of pros and cons, effects of the place system itself. I have heard a lot of pros and cons.

I have not heard it discussed in terms of promoting a governmental interest perhaps such as you would hear arguments [143] surrounding the at large v. the single member district question. There, compelling government interests are debated as to what is advanced by either election system. But in place system, no.

Q. Have you done any research on Texas municipal government? Have you taught any courses, done anything in that area?

A. Yes. I teach in small schools. We have to learn to teach a lot of courses over time. And I have taught for nearly 20 years. I teach courses in urban politics at the masterate level and at the undergrad level as that opportunity rotates to me.

And also the research I have done and some of the writing I have done more recently that was published was on Texas and Southwestern cities. More specifically, I would remind you that I have done voting studies in numerous Texas jurisdictions, many of which include cities.

Q. You have been present for the testimony during this case?

A. Yes.

Q. You have heard testimony of a general law city and a home rule city. Based on your experience in that, making distinctions of law, what do you view as the difference between a general law city and a home rule city?

A. Looking at it from the political science textbook [144] point of view —

Q. Correct.

A. — a general law city, there would be probably close to a thousand of them in Texas. These are cities which are 5,000 in population and under. And the chief distinction would be that their powers — or they have powers as are given to them from state legislative statutes.

The home rule city, on the other hand, there are some 214 of those in Texas, 5,000 population and above, have really a wide set of discretionary powers, including powers fundamental, I think, such as adopting a charter and the form of government that that implies and any number of other powers which would accrue to home rule cities under the Constitution of Texas and statute.

In other words, there is a wide degree of discretion in the adoption and appendages which these cities can employ as opposed to the rather, I suppose, restrictive status of general law cities, restrictive in the sense that they have powers only that are given to them by state legislative statute.

Q. Basically, a summary of your testimony would be that the general law city does what's authorized and the home rule city does —

A. By state law.

Q. By state law.

A. I think I tried to say that the distinction was [145] the degree of discretion and choice that is extant with the home rule cities.

Q. Based on your research of Texas municipalities, are you aware of any other general law city, other than Lockhart prior to its charter, that used numbered posts?

A. No, I am not. But I want to say that there are great numbers of those general law cities, and I don't know of anyone who knows systematically that that is the case one way or the other. But I did have occasion to make contact with those cities in the more recent Civil Rights Commission publication and in so doing in the correspondence with them and also in the telephone communications with them, those cities that we needed to contact did not employ the place system.

JUDGE ROBINSON: I would like to intrude here for just a moment, because I am getting a little confused.

It's my understanding that under Texas law a general law city is a city having only delegated powers. In other words, all of its powers must be conferred by the State.

Am I correct?

MR. BERMAN: That's correct, Your Honor.

JUDGE ROBINSON: If that's the situation, isn't it a simple enough matter to find out whether or not general law communities in Texas have the authority to number their posts for elective purposes?

[146] MR. BERMAN: Yes, Your Honor.

JUDGE ROBINSON: If Texas law does not grant that authority, they don't have it. Isn't that so?

MR. BERMAN: That's correct, Your Honor.

THE WITNESS: Your Honor, my comments were, as a political scientist, not in terms of the statute and not what is permissive and what is restrictive.

JUDGE ROBINSON: I understand. What was giving me a little difficulty, Doctor, is the fact that I had gathered from my understanding as to what a general law city is, that it had to be a matter of law in Texas.

Am I right, counsel?

MR. BERMAN: That's correct, Your Honor. There's the general law city using the commission form of government.

JUDGE ROBINSON: You may pursue your inquiries with Dr. Cotrell in any fashion that you want as to what he knows about it or his experience and that type of thing. I just put my questions, because I was trying to work myself out of a dilemma.

MR. BERMAN: That was my only question on that point, Your Honor.

BY MR. BERMAN:

Q. Directing your attention to the staggered terms and their use in the Lockhart election plan, is there a general political theory as to the governmental interests that are [147] furthered by the use of a staggered term or overlapping term provision?

A. I suppose academicians are as worrisome about language as attorneys are. And is there a general political theory? No. The

staggered terms would be employed and the rationale given for them that would be employed, and it's not that profound or pervasive, I suppose, would be continuity.

That is, they ensure continuity.

Q. Would this governmental interest or concern be stronger in a city that employed a city manager?

A. Well, I say that was the rationale. If you study incumbency rates in American city councils, you find that they are relatively high and when people do resign they resign basically voluntarily, they get out of office. So there is — Incumbency itself ensures continuity, contra to the rationale.

Secondly, the council manager form, there is a continuity, of course, that is attached very much so to the election year — to election year existence and performance of a council manager and, of course, to the day-to-day routine. That's part of the so-called reform ideology that Dr. Taebel spoke of.

Q. So a city manager would, in essence, attempt to remove some of the uncertainty of the every other year or every year election phobia?

A. Well, no. All I am saying is a manager in a [148] council-manager form provides continuity.

Q. Thank you.

Now, on staggered terms, I would like you to take a pure at large system without numbered posts and four offices that are being contested. If you have these four offices being elected all at the same time, let's say every even numbered year, what would be the effect of staggering those to the extent of two every year?

In other words, what does that do?

A. So I understand your electoral context, you mean an at large system that elects by plurality?

Q. Correct.

A. An you have introduced staggered terms?

Q. Correct.

A. Well, what you have done is made discrete election years out of — The staggered term does that by definition. It has to do that. Let's say we had five in the case of Lockhart. You have a mayor and two council members who are elected in even numbered years, and you have three discrete elections.

And then you have — in your odd years you have two council positions which are elected. What you have done, basically is obviously not only limited the number of positions which are up with the staggered term, but you have also, in the sense of a discrete election year, increased the visibility and salience of the positions or posts which are up for [149] election. That stands to reason.

Q. I would ask you not to assume that they are posts but to assume that they are merely positions in the essence of a pure at large.

A. Well, you were using the term positions. I have given you the at large place suggestion. If you had —

Well, still, the effect in a pure at large plurality systems of staggered term would be to establish discrete election years and thereby make the positions which were up for election, odd or even numbered years, more visible and salient to the electorate.

But, of course, that visibility — pardon me. But if that visibility is considerably enhanced and increased when you add the spotlight feature of the numbered posts or place situation to the situation you have described —

Q. So that you have testified that the numbered post provision will tend to spotlight candidates and the staggered terms would tend to spotlight candidates?

A. Well, if you have one election a year, the visibility and salience of that election is undeniable. And the degree to which you decrease the number of posts up in a given year, to that degree you increase the visibility and salience of those particular posts or positions during that year, yes.

Q. The imposition of a staggered term provision in a pure at large system, what effect would that have on members [150] of the minority community?

A. The imposition of a staggered term, we have had a great number of situations here. Staggered term on the at large system, with a plurality ballot?

Q. Pure at large.

A. No numbered places.

Q. No numbered places.

A. Well, the impact would be — I think would not be a good one, only insofar as the visibility and salience of particular election — fewer positions in a sense are being run for in a given election year.

But I hasten to say that the visibility and salience of the place system weighs, I think, heavier than the staggered term.

Q. In other words, the numbered post system or place system would have a greater impact on this visibility concept than staggered terms.

In other words, if you were to compare a pure at large and to impose numbered posts in one instance and staggered terms in the second instance, both on a pure at large system —

A. — the adverse impact would exist in both situations, but in my opinion the adverse impact would exist in a weightier way in the numbered-post, staggered-term situation.

* * * *

Cross Examination By Mr. Mizell:

* * * *

[167] Q.Dr. Cotrell, the question is: If you isolate the issue of size for a moment from three to five, do you disagree with the conclusion advanced by Dr. Taebel that that has an enhancing factor — that is, an enhancing factor on the electability of minorities?

A. I don't mean to enjoin the discussion here, but under what context is this taking place? I mean enlargement under what?

Q. I am talking in terms of general political theory, political analysis based on any data that you have ever seen on that subject or any investigation that you have ever done.

A. Simply and solely will the enlargement somehow enhance electability? No, I cannot agree that that is a necessary conclusion.

Q. Does it hurt it?

A. No, I don't think it hurts it.

Q. And you have expressed in your deposition a personal preference for enlargement, have you not?

A. In the context of that deposition, for larger councils generally. But I think we had talked about significantly larger councils, also.

* * * *

[170] Q. With respect to staggered terms, Dr. Cotrell, you have testified that the staggered term is a negative feature of an at large election system, have you not?

A. I have testified that the staggered terms in the context of the situation we are talking about, it's my opinion that they have a negative impact, yes. It has a negative impact.

Q. With respect to the use of that feature in elections, you mentioned the aspect of continuity and I want to ask you whether, when you have a relatively unsophisticated body of people who are

trying to put together a charter, you think that it is irrational for that group to conclude that continuity is a desirable feature.

Is that irrational?

A. I thank that the rationale that is given for continuity in the use of staggered terms is a rationale. I would not think it irrational for a group of citizens to use that viewpoint to support the adoption of staggered terms.

[171] Q. It does not necessarily result from any desire to injure a minority?

A. I cannot comment on the intent that the citizens had, but if your question was whether or not it would be irrational for a group of citizens to use that as a reason, I would say it would not be unusual.

Q. All right. With respect to numbered places, you were asked the question about are there any positive features of numbered places and you said, "I have heard a lot of pros and cons," but you never did give the pros.

Could you give us those?

A. Well, actually, I was quoting the publication of Roy Young's, "The Place System in Texas," and he summarizes them. I have that, if you would like to see that summary.

Q. Can you recall right offhand what some positive features of an at large system are?

A. The pros as he writes about them in his summary?

Q. Yes.

A. One, that the at large system tends to clarify issues in large groups of candidates. And then he goes on to talk about what a large group of candidates is. He means fairly large numbers, in the range of 20 or 30.

Q. Do you disagree that the numbered place does tend to have that effect?

A. I am not certain that in smaller groups of candidates [172] and Young's — I'll let Young's document speak for itself. I am not

certain that numbered posts in a small community have the effect, basically, of clarifying issues over a non-numbered post system.

Q. Do you have any data to support this suspicion?

A. No, the numbered — In fact, Roy Young's work is basically from a collection of a survey of numbered post systems in Texas and also a number of interviews he conducted with people who have lived under and not lived under the numbered post system.

Q. But there is at least a rational basis, if you will, for use of the numbered place system. You will concede that?

A. Well, I think that my answer to Mr. Berman on that question clearly said that there is a rationale that contends that staggered terms can be used —

JUDGE GREENE: Was the question staggered terms or numbered posts?

THE WITNESS: Or numbered posts can be used to clarify — No. I didn't speak on that issue with Mr. Berman. That's a pro, yes. That's an argument advanced in favor.

BY MR. MIZELL:

Q. Of course, the advantages or at least the positive attributes of an at large system would be such things as automatic equality of vote, wouldn't it?

A. Well, I said that — if you will recall, that the [173] rationale in terms of compelling government interest in numbered posts is not the same and it doesn't have the same kind of weight and argument, I don't think, as the arguments over at large and single member district.

The entire reform movement and those who countered the reform movement elevated to high position of debate the virtues and vices of the at large and single member district system. The place system simply hasn't been debated in that kind of a weighty context.

Q. You have indicated that the adoption of the charter was a fundamental change for government in Lockhart. Is that correct?

A. That's — Well, I have indicated that a change to a home rule city would be viewed by a political scientist as a fundamental change in govermental form and the appendages and powers accruing thereto.

Q. You are a political scientist, are you not?

A. Yes, I am.

Q. I would like for you to tell me without simply — without talking in terms of general authority v. specific authority, and that kind of thing, I want specifics, if you will, of what you called — of the factors on which you base your conclusion that that was a fundamental change.

A. Oh. Well, I can't think of a more important act for people to engage in in terms of study commissions and [174] elections and so on than choosing the form of government under which they will live. That's —

Q. Choosing the form of government?

A. I mean council member, strong mayor. I can't think of a more important question. And then a series of questions that would be of equal importance. I think that the way in which Americans choose people who represent them and the rule of the game governing those choices are really fundamental.

Now I am not certain that everyone would agree with me in that regard, but certainly a form of government is a fundamental question.

And then, thirdly, the discretionary or wide range of discretionary powers which can be appended to a home rule city, too, deeply impact the functions and performance of a government.

Q. Well, would you also put in things like initiative and referendum and recall?

A. Oh, most certainly, yes.

Q. And anything else that comes to mind right now?

A. Well, you know that home rule cities, I think, are under the 1963 Municipal Annexation Act, and annexation and the powers of

annexation in terms of actually expanding the boundaries or size of a city or jurisdiction it seems to me that's pretty fundamental.

Q. Anything else?

[175] A. Well, I mean we could go down the charter —

Q. Well, I suppose we could. Let's just deal —

A. But those are four or five things, yes.

Q. Choosing your form of government was your first response. That is the power that the people have under a home rule charter that they do not have under the general law city. Is that correct?

A. That's correct.

Q. Now investing [sic] in the people the power to choose their own form of government does not affect how they do it, it simply says they can do it. Isn't that right?

A. It gives to representatives and citizens alike in a jurisdiction a fundamental choice.

Q. Which they did not have before?

A. In a whole wide range of areas, yes, sir.

Q. All right. But in terms of actually impacting on their voting rights, which is what this case is all about, can you identify anything other than the staggered terms, the numbered places, and the things that we have been talking about specifically, any of those factors that are impacted by adoption of the charter?

A. Let me respond to what I thought you started with, the form of government. Does the form of government adopted, the council-manager, strong mayor, weak mayor, commission, does that impact adversely or enhance in any way minority [176] voting rights? And I do not believe that it does.

Q. All right. And then the answer to the question, then, that I just posed, other than those specific changes, and I am talking about numbered places and all that stuff that you have characterized as changes —

A. Yes.

Q. — other than those, are there any factors, any features of the charter which impact upon voting?

A. Well, there would be one other I think that came up and that is the charter, as I recall, contains in it the day that the election is held. Now the depositions are not totally clear on how that debate took place on the day, but it was said that — the charter, I think, says Tuesday in April, the first Tuesday in April.

I am not certain of the language. And I think that in one of the charter revision discussions, I believe it was the original one —

Q. The charter revision?

A. The charter adoption discussions, I should say.

Q. All right.

A. Then there were some revision discussions also. But in the original charter adoption discussions, I recall that one Mexican-American citizen of Lockhart asked for a change in the day, but the depositions, of course, will reflect that debate in its clarity or its ambiguity.

* * * *

TESTIMONY OF BERNARD RANGEL

* * * *

Direct Examination By Mr. Garza:

* * * *

[209] Let's discuss for a moment your first campaign. I believe you said that was in 1973?

A. Yes, sir, it was.

Q. How far in advance before you filed did you make a decision that you wanted to run?

[210] A. About two months before —

Q. About two months?

A. — the deadline to file for that office.

You did make a conscious decision that you were going to run for that position. Is that right?

A. Yes, sir, I did.

Q. Now I believe that you testified in deposition before that one of the reasons that you made that decision was because of the availability of a new slot, because of the charter change. Is that correct?

A. Yes, sir.

Q. O.K. Was that the motivating factor in your decision to seek office?

A. No, sir, it was not. I never deliberated to myself. I just saw it as two positions. My goal was to eventually get one of those. The motivating part on my part was in '72 Raza Unida was active in the City of Lockhart and Raza Unida — it was a political organization organized mainly by Mexican-Americans which in '72 had a candidate for governor of the State of Texas.

And they made various rallies and appearances in the City of Lockhart and they had had very good response, they motivated people real well. And that is what I attribute my decision to run for city council.

Q. That was the basis of your enthusiasm or the creation [211] of this enthusiasm with you?

A. Yes, it is.

Q. You are not a member of Raza Unida, are you?

A. No, sir, I am not.

Q. And you never have been, have you?

A. No, sir, I have not.

Q. Do you know if this activity by the Raza Unida party in Lockhart and their campaigns received media coverage in Lockhart?

A. Yes, sir, it did.

Q. So it was —

MR. MIZELL: Excuse me.

May it please the Court. Once again, we are in election politics in '72, which we would contend has nothing to do with the adoption of this charter. I don't want to just beat this thing to death, but if I may I'd like to register an objection.

* * * *

Direct Examination By Mr. Avila:

[245] Q. Mr. Rangel, you ran for city council, did you not, in 1973 and '78?

A. Yes, sir, I did.

Q. And are you familiar with the numbered place system and the staggered terms?

A. Yes, sir. I am.

Q. As they are implemented in the City of Lockhart?

A. Yes, Sir.

Q. Would you please describe to the Court what effect these devices have on Mexican-American political participation?

A. The place system and the staggered term system have the same effect in my opinion because the Mexican-American candidates are targeted. We're put up against the best and —

MR. MIZELL: Excuse me, Your Honor. I would object [246] to this witness expressing an opinion on the matter in which he's not shown to have appropriate expertise.

JUDGE ROBINSON: I'm not sure he's doing that, Mr. Mizell. Would you clear up with the witness whether he is giving us his opinion, or whether he is speaking from personal knowledge and if so, what the basis of it is.

BY MR. AVILA:

Q. Mr. Rangel, would you please indicate to the Court whether your are speaking from personal knowledge and what ex-

periences and factors that you have in your own personal life out there in the City of Lockhart?

A. It is my personal opinion that the place system and staggered terms —

JUDGE ROBINSON: The objection is sustained.

BY MR. AVILA:

Q. All right, let me rephrase the question, Mr. Rangel. You've been active in political life, in political campaigns in the City of Lockhart, have you not?

A. Yes, I have.

Q. And would you please describe to the Court those campaigns?

A. I ran for city office in '73 and again, in 1978. In '73, I ran for City Council, Place 3, and in '78, for Place 1.

Q. And apart from the personal involvement as a [247] candidate, you have assisted other campaigns in the City of Lockhart?

A. Yes, sir, I have.

Q. And in the process of assisting and participating in the electoral process, you have examined the impact of the staggered-terms and the numbered-places, is that correct?

MR. MIZELL: I'm going to object to counsel leading the witness.

JUDGE GREEN: I believe all of this was testified to yesterday.

JUDGE ROBINSON: Well, we've been pretty liberal, I think, with everyone on leading questions.

MR. AVILA: Thank you, Your Honor. I'm just trying to save the Court time.

JUDGE ROBINSON: Why not lead the witness anymore.

BY MR. AVILA:

Q. You are familiar with the staggered terms and numbered place system in the City of Lockhart, is that correct?

A. Yes, sir, I am.

Q. And could you tell the Court what effect those election devices had on your 1973 campaign?

A. In 1973, as well as 1978, the campaigns on my part focused a lot on the Anglo candidate. It also almost put me on a one-on-one basis in '73. It did not do it in '78. And [248] it is my opinion that if I would have been on a one-on-one, One Place, in either year, I would have not been elected in '78.

In staggered terms, it is my opinion that you run against the best every year. Therefore, it would have hurt me more, also.

Q. Are you familiar with the concept of plurality system?

A. Yes, sir, I am. It is a system where the one that has — you can even win by one vote.

Q. Would Mexican-Americans have better opportunity to participate in that system than in a numbered place and staggered term system?

A. It's my opinion that I dislike both, the plurality and the staggered-terms.

Q. Did you say "plurality," which means numbered place?

A. Yes, sir, I did.

MR. MIZELL: We would like to renew our objection to the opinion testimony and ask that this be stricken.

JUDGE ROBINSON: Well, the question may not call for opinion testimony, although the witness may have several times couched his answers in terms of "It is my opinion . . ." See if you can sharpen your questions a little more.

May I take advantage of this, to ask the witness a question, myself?

[249] MR. AVILA: Certainly, Your Honor.

JUDGE ROBINSON: Mr. Rangel, how many opponents did you face in the 1978 election for the post of which you were running?

THE WITNESS: Four.

JUDGE ROBINSON: And they were all, what —

THE WITNESS: Anglos.

JUDGE ROBINSON: Very well.

I think I understand, but maybe I had better clear this up. In your first race, you said it was head-to-head. That means you only had one opponent?

THE WITNESS: No, sir. Well, I had two Anglo opponents.

JUDGE PRATT: What has this to do with the staggered-terms? That's my problem. If it had been regular-term, rather than staggered-term, wouldn't you face the same problem?

THE WITNESS: Yes, I would have.

MR. AVILA: These observations that you've given the Court, are these based on your own personal knowledge and observations?

THE WITNESS: Yes, sir, they are.

* * * *

TESTIMONY OF FREDERICK CERVANTES

Direct Examination By Mr. Garza:

* * * *

[254] Q. Doctor Cervantes, you were present in the court when Doctor Taebel addressed the Court, were you not?

A. Yes.

Q. Now do you agree with his analysis on voter polarization for Lockhart?

A. In what respect, if you could be specific — Generally, I do agree that voter polarization exists in Lockhart on the basis of my examination of the evidence, yes.

Q. Could you describe for the Court what that examination entailed?

A. That entailed the reading of depositions. It also entailed my review of the correlation between the percentage of Spanish surnamed — persons who actually voted with a percentage of vote received by Spanish surnamed candidates. Among those candidates

that have run for city council position and also in the case of Mr. Weisz [phonetic] for mayor since 1973. And it also correlates with the facts of residential segregation that exists in Lockhart and I've heard testimony [255] on that and I've also looked at the data that was provided for EEOC which indicates certain — there are certain economic and demographic data which is consistent with this pattern.

Those things taken together are what I would base the conclusion on.

Q. With respect to the data on the elections, themselves, have you done a comparison with any other cases on how they stack up?

A. Yes. I looked at the Wilkes case, which was in April of 1979, Wilkes County, Georgia versus United States, and I found that the correlation between the percentage of Spanish surnamed voters with the percent of vote received by the Spanish surnamed candidate was stronger than the correlation in the Wilkes case between the percentage of Black registered voters and the percentage of votes received by the Black candidates.

I think that in addition, it is a more signification correlation because in the case of Lockhart, we are talking about comparing actual voting percentages, not just registered voters, but people that actually went out and voted, whereas in the Wilkes case, it was simply a comparison of registered voter figures. In Lockhart, we have data that was taken from the polls that indicate the percentage of Spanish surnamed persons who would be predominantly of Mexican origin, of course, that actually voted in those elections.

[256] Q. You were present in the courtroom when Doctor Taebel made his presentation, were you not?

A. Yes.

Q. Do you agree with his conclusion that staggered terms enhance the minority opportunity, or could enhance the minority opportunity to be elected because it lowers voter turnout?

A. Well, as you put the question and as I remember Doctor Taebel's analysis, I think that he opposed, certainly, a logical possibility in the sense that if one had low voter turnout and one also could assume polarization which I would conclude exists in the City of

Lockhart for the number of reasons I cited earlier, then it is conceivable that you could have a kind of ambush effect in the sense that you would organize your block of voters to go out and make a disproportionate impact on the electoral process.

However, it seems to me that that eventuality, that possibility, is something that is only likely to occur, and that is what I would be concerned with, what is likely to occur in the context in which you have a highly developed and somewhat sophisticated political organization. Having worked on a number of campaigns, I am aware of the effect that can be achieved in terms of targeting phone banks to make sure that the people who have identified with your candidate, whom you know will support your candidate, are going to come out. [257] But in reading the depositions, particularly those people of Mexican descent who were on the commission and in hearing the people here from Lockhart of the Mexican-American community, I have not gotten the impression that there is a very well developed sense of political efficacy, or awareness, or organization among the Mexican-American community.

In terms of that supposition, the only evidence that I could see is that in Marie Burton's deposition, for example, and also in Shuford Alexander's, there is a feeling on their part that Mexican-Americans did stick together and did get together and make sure that they didn't run against each other. But neither of them indicated that they had any real knowledge, that this was just their feeling. So I would say that in the City of Lockhart, that Doctor Taebel's hypothesis is very unlikely.

What we also know about low voter turnout in terms of demographic characteristics of the electorate is that generally low voter turnout adversely affects minorities in the sense that — and I would say this would be particularly applicable to the Mexican-American population in the sense that people of lower socio-economic status tend to vote less than people of higher economic status and in low voter turnout, this goes down disproportionately. Also, we know that young people tend to vote less than older people. This has been substantiated in survey work done by Michigan Survey Research [258] Center. It has been substantiated in voting analysis that has been done by the United States Census Bureau and in view of the fact that

the Mexican-origin population is disproportionately young, it is disproportionately low in terms of socio-economic status. I would assume that one could also project the analysis that if staggered terms produced low voter turnout, then staggered terms are going to affect the — potentially affect the Mexican-origin population in an adverse way.

MR. GARZA: May I confer at counsel table for a moment, Your Honor?

JUDGE ROBINSON: Certainly.

(Short pause.)

BY MR. GARZA:

Q. One last area, Doctor Cervantes, in regards to the increase in the size of council when you apply that to the circumstances in Lockhart, what effect in your opinion would that have?

A. Well, I would find that difficult to judge and I find the opinions offered in the depositions contradictory, but the one sort of solid expert witness testimony that's been offered is that of Doctor Taebel and I would find that Doctor Taebel's aggregate analysis really does not clearly in my mind apply to the City of Lockhart in the sense that he shows quite clearly that there is an advantage to be gained [259] by Hispanics, even in relation to Blacks, as the nature of council's increases from small to medium to large. The problem is these are very large categories in that according to Doctor Taebel's analysis, the small side of council is defined as one to six. So that in essence, the City of Lockhart had a small council and increased it to a small council in terms of Doctor Taebel's analysis. In that sense, we have an example here of what may be the ecological fallacy in that this particular difference that has been moving from two to one may not at all be reflective of what has been characterized in the general analysis which is based on much larger groups of categories.

* * * *

Cross Examination By Mr. Mizell:

* * * *

[261] Q. On the other point that you made with regard to Doctor Taebel's distinction of small, medium, and large council, first of all, you do not dispute the finding that he had with respect to the categories that he outlined in his article, I take it?

A. That's right.

[262] Q. What you are raising is a question of whether or not that finding would apply when you increase a council from three to five because there was no data on that particular incremental change, is that correct?

A. That's true. However, as I understand it, it is a question of increasing the council's seats from two to four with the mayor being constant. It's three to five, yes.

Q. Well, you and I understand each other then?

A. Right, we understand.

Q. And my last question is, you do not have, yourself, any resource or any access to any resource data that would tend to indicate that the increase in size which he described as a positive feature for the categories he had, you don't have any data to show that does not apply when it's a smaller increment that we're talking about, do you?

A. That's right. I have no such data.

* * * *

Examination By The Court:

JUDGE PRATT: I've got a question, Judge Robinson. Doctor Cervantes, directing your attention to the matter of the size of council, you have testified as I understand it that if you got a council of large enough size that is bigger than a small council, it might enhance the voting power of [263] minority groups. Is that correct?

THE WITNESS: That's what I think Doctor Taebel's data indicates.

JUDGE PRATT: For example, if you made everybody in the town of Lockhart a member of the council, obviously, a minority would have more rights under those circumstances than would a smaller one?

THE WITNESS: That's true.

JUDGE PRATT: Conversely, do you see anything adverse to the voting rights of minorities in the increase that was proposed in this case, namely three to five?

THE WITNESS: No. I see nothing adverse.

JUDGE PRATT: In other words, you regard that as neutral?

THE WITNESS: Yes, especially if it's taken in connection with the at-large by-place voting system because if we have at-large by-place voting along with racial polarization, increasing — and you assume the logic of that, increasing the size of council up to a certain point will not make any difference. It's like receiving additional copies of the same newspaper as far as the different constituencies and the electorate are concerned.

JUDGE PRATT: Thank you.

EXHIBIT

PLAINTIFF'S EXHIBIT NO. 7

YEAR	REGISTERED VOTERS M/A **	OTHER #	TOTAL **	ELECTION	VOTES CAST M/A **	OTHER #	TOTAL *	RESULTS *
1970	599	2041	2640	Mayor			478	Chesser 469, Others 5, (Total 474)
				Pl 1				Kirksey 477, Others 1, (Total 478)
				Pl 2				Royal 474, Others 1, (Total 475)
1972				Apr. Mayor			840	Chesser 638, Others 8, (Total 646)
				Apr. Pl 1				Kirksey 606, Ohlendorf 211, (Total 817)
				Apr. Pl 2				Royal 631, Others 1, (Total 632)
				Sept. Charter Proposal	40	203	243	For 202, Against 41, (Total 243)
1973				Feb. Charter Election	57	292	349	For 309, Against 40, (Total 349)
				Apr. Pl 3	417	958	1375	Burton 592, Ramsey 445, Williams 272, (Total 1309)
				Apr. Pl 4				Frizzell 802, Serrato 401, Knudson 68, Waldrop 64, (Total 1335)
1974				Mayor	197	824	1021	Kirksey 808, (Unopposed)
				Pl 1				Hartzog 518, Burchill 322, Heath 149, (Total 989)
				Pl 2				Royal 689, Cano 320, (Total 1009)
1975				Pl 3	10	166	176	Burton 156, Others 0
				Pl 4				Frizzell 167, Others 0
1976				Mayor	402	766	1168	Kirksey 793, Pappas 329, Others 25, (Total 1147)
				Pl 1				Hartzog 806, Wooddell 320, Others 7, (Total 1133) (Hartzog resigned in Apr.77)
				Pl 2				Bell 901, Others 22, (Total 923)
	A single election for all			Amend to City Charter				
				Prop 1 Qualifications, $3.02				For 820, Against 94, (Total 914)
				Prop 2 Elections, $5.01				For 833, Against 55, (Total 888)
				Prop 3 Majority, $5.05				For 813, Against 78, (Total 891)
1977	974	2293	3267	Pl 3	233	834	1067	Burton 665, Prunedo 251, Pappas 28, Wooddell 87, Others 8, (Total 1039)
				Pl 4				Perry 250, Kelly 368, Frizzell 409, (Total 1027)
1978				Mayor	660tt	1333tt	1993	Ruiz 642, Chesser 764, Burton 268, A.L. Tally 319, (Total 1973)
				Pl 1				McKinney 428, Mayerson 259, Mangel 655, von Kohl 204, Heath 399, Other 1, (Total 1946)
				Pl 2				Scott 713, Limbrick 37, Bell 458, Smith 147, Salazar 602, Other 3, (Total 1960)
				Pl 3				Kelley 1301, Others 42, (Total 1343)

* From Minutes
** By count of names from records
ℓ Subtracting M/A's from Total
tt By actual headcount at poll

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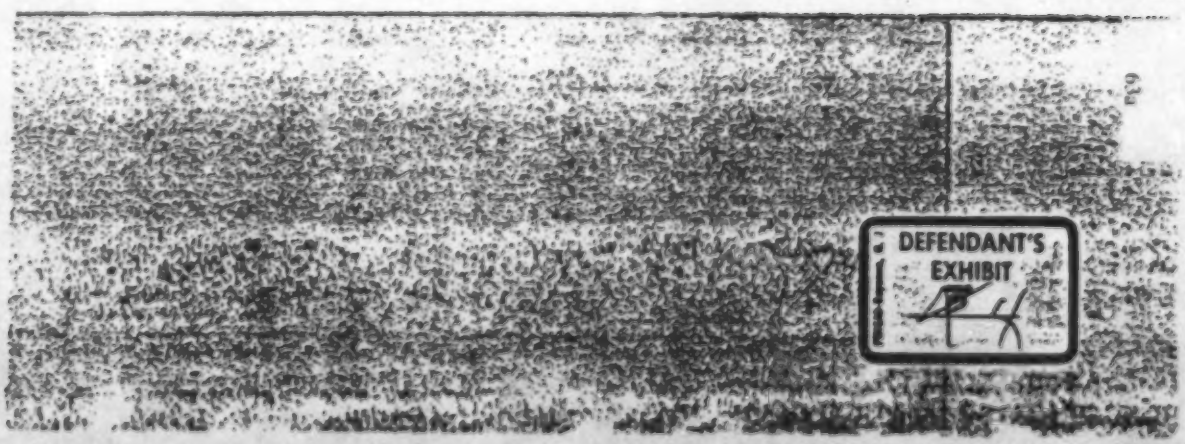
Handbook for Mayors & Councilmembers in Home Rule Cities

TEXAS MUNICIPAL LEAGUE
1020 SOUTHWEST TOWER
AUSTIN, TEXAS 78701



The Home Rule Concept

Although scholars have used a variety of flowery phrases to describe the concept of home rule, its essence is simple: the right of citizens at the grass-roots level to manage their own affairs with minimum interference from the state. Home rule assumes that governmental problems should be settled at the lowest possible level of government, closest to the people, and that the undue concentration of powers in higher levels should be curtailed.

As mentioned earlier, home rule cities look to the state to tell them what they are forbidden from doing, rather than for specific grants of authority to undertake particular functions. Texas' home rule doctrine was summarized by the Texas Supreme Court in *Forwood v. City of Taylor* as follows:

> It was the purpose of the Home-Rule Amendment . . . to bestow upon accepting cities and towns of more than 5,000 population full power of self-government, that is, full authority to do anything the legislature could theretofore have authorized them to do. The result is that now it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers. (Emphasis supplied.)[4]

As a result of *Forwood* and other cases upholding their broad powers, home rule cities have the inherent authority to do anything which qualifies as a "public purpose" and is not contrary to the constitution or laws of the state. From the city attorney's vantage point, this means that the presumption will be in favor of ordinances and other acts of a home rule city whenever the city is a party to a lawsuit. From the city council's viewpoint, it means that new programs can be initiated to solve problems whenever they occur.

Inherent Powers Of Home Rule Cities

An "inherent power" is one that is possessed by a city without its having been specifically granted by the state. It is the right to perform an act without having received that right from the Texas Constitution or the state legislature.

Home rule cities have many inherent powers. A discussion of several of major significance may explain why so many cities have chosen to adopt charters.

Municipal Organization

In contrast to counties, general law cities, and special districts, whose organization is fixed by state law, the governmental structure of a home rule city is left entirely to the discretion of local voters. Subject to compliance with the federal Voting Rights Act, the citizens of a home rule city are free to decide

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4*Forwood v. City of Taylor*, 214 S.W. 2d 282. (1948)

their form of municipal government (mayor-council, council-manager, etc.); choose between a large or small governing body; provide for the election of the city council at large, by single-member districts, or by a combination of the two; fix councilmembers' terms of office at two, three or four years; and establish overlapping terms of office. Moreover, they can decide whether the mayor is to be elected directly by the voters, selected from among members of the governing body, or chosen by some other method.

The citizens of a home rule city also have total discretion over the city's administrative structure. Subject only to local preferences, the charter can establish a simple administrative framework or a complex one; prescribe the specific duties of the various city departments or delegate this item to the city council; provide for the appointment or election of major administrative officials; and so on. And finally, the charter can provide for the creation of any boards or commissions local voters decide are needed as part of the machinery of the city government.

Annexation

The inherent power of unilateral annexation is one of the most highly cherished of all home rule prerogatives. There is no state law forbiding a home rule city from annexing land adjacent to the city without the consent of the inhabitants thereof; the city therefore has the inherent right to do so if permitted under the charter.

The following excerpt from the Lockhart charter is typical of provisions granting the city council unilateral annexation powers:

> The City Council may by ordinance annex territory lying adjacent to the city with or without the consent of the inhabitants in such territory or the owners thereof, not inconsistent with the procedural rules prescribed by law applicable to the cities operating under charters adopted or amended under Article XI, Section 5, of the Constitution of the State of Texas.

The power of unilateral annexation is important for several reasons. For one, it enables a growing city to achieve orderly physical development. Also, it permits a city to maintain a strong economic base by extending its boundaries to encompass the tax valuations and other resources required to finance municipal services.

Dramatic evidence of the importance of unilateral annexation powers exists in other states where cities enjoy no such powers. One source summed it up as follows:

> Liberal state annexation policies in certain parts of the South (e.g., Jacksonville) and West (e.g., Houston) have permitted cities in these regions to share the benefits of growth in surrounding areas. Cities in the Northeast and Midwest have remained "landlocked," permanently separated from the growth in

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1973				Feb Charter Election	[illegible]	[illegible]	349	For 309, Against 40, (Total 349) }
				Apr Pl 3	417	858	1375	Burton 592, Rangel 445, Williams 272, (Total 1309)
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				Pl 1				Hartzog 518, Burchill 322, Heath 149, (Total 989) ~~Hartzog resigned~~
				Pl 2				Royal 689, Cano 320, (Total 1009)
1975				Pl 3	10	166	176	Burton 156, Others 0
				Pl 4				Frizzell 167, Others 0
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				Prop 3				For 813, Against 78, (Total 891)
1977	974	2293	3267	Pl 3	233	834	1067	Burton 665, Pruneda 251, Pappas 28, Wooddell 87, Others 8, (Total 1039)
				Pl 4				Perry 250, Kelly 368, Frizzell 409, (Total 1027)
1978				Mayor	660tt	1333tt	1993	Ruiz 642, Chesser 764, Burton 248, A.L. Tally 319, (Total 1973)
				Pl 1				McKinney 428, Mayerson 259, Rangel 655, von Kohl 204, Heath 399, Other 1, (Total 1946)
				Pl 2				Scott 713, Limbrick 37, Bell 458, Smith 147, Salazar 602, Other 3, (Total 1960)
				Pl 3				Kelley 1301, Others 42, (Total 1343)

DEFENDANT'S EXHIBIT 14

DEFENDANT'S EXHIBIT 14

DEFENDANT'S EXHIBIT 4

* From Minutes
** By count of names from records
Subtracting M/A's from Total
tt actual headcount at poll

Ex 2D

Handbook for Mayors & Councilmembers in General Law Cities

TEXAS MUNICIPAL LEAGUE
1020 SOUTHWEST TOWER
AUSTIN, TEXAS 78701

the greatest number of functions, both governmental and proprietary. Generally speaking, a "governmental function" is one that is: (1) required by law to be performed by the city in its capacity as an agent of the state; and (2) performed by the city as a matter of legal duty for the benefit of the general public, rather than for the local benefit of city residents. Examples include law enforcement, fire protection, planning and zoning, health and sanitation, hospitals, and traffic control.

Again, generally speaking, a "proprietary function" is one that is (1) performed by the city voluntarily and not because state law requires it; and (2) performed for the primary local benefit of the city and its residents rather than for the general public. Examples exclude parks, electric and gas utilities, bus systems, parking lots and zoos.

Cities fall into two categories: home rule and general law. Cities over 5,000 population are eligible for home rule status pursuant to Article XI, Section 5 of the Texas Constitution and Article 1165, et seq., Vernon's Texas Civil Statutes. The legal position of home rule cities is the reverse of general law cities. (See below.) Rather than looking to the state law to determine what they **may** do, as general law cities must, home rule cities look to the Constitution and state statutes to determine what they may **not** do. Thus, if a proposed home rule city action has not been prohibited or pre-empted by the state, the city generally can proceed, if authorized under the charter.

Most municipalities of less than 5,000 population are general law cities, towns or villages, though there are some municipalities over 5,000 population that have not exercised the option of adopting home rule charters.[3]

All general law cities operate according to specific state statutes prescribing their powers and duties. General law cities are restricted to doing what the state tells them to do; nothing more, nothing less. If state law does not grant general law cities the express or implied power to initiate a particular action, none may be taken.

Approximately 80 percent of Texas' 1,100 cities operate under the general laws; the balance are home rule cities which operate under local charters. "General laws" is a term used to describe all of the state laws applicable to a particular class of things. A general law city therefore is one that is subject to all of the state laws applicable to such cities, most of which are found in Articles 961 through 1164a-10, Vernon's Texas Civil Statutes (V.T.C.S.).

General law city officials occasionally call the Texas Municipal League office to request a copy of their "city charters." Unlike home rule cities, a general law

[3]For various reasons, approximately 35 Texas cities over 5,000 population have elected not to adopt charters, choosing instead to continue operating as general law cities. As of mid-1980, there were 225 home rule cities in Texas—approximately one-fifth of the total number of cities in the state.

United States of America

Department of Justice

September 10, 1980

I hereby certify that the annexed paper is a true copy of the original record which is in the official custody of the Department of Justice, to wit: A listing of objections interposed in the State of Texas, as of September, 1980, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

In witness whereof, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

John P. MacCoon

John P. MacCoon
Director, Section 5
Civil Rights Division
U.S. Department of Justice

Defendant's Exhibit No. 21

STATE: TEXAS

SUBDIVISION	OBJECTION	DATE OF OBJECTION
Texas	SB 300 purge of currently registered voters	12-10-75
State (Jefferson & Tarrant Cos. and single member districts for Nueces Co. included)	HB 1097 '71 reapportionment nine multi-member State Rep. District	1-23-76
State	Section 6 of SB 1 requiring certain parties to elect candidates by convention instead of primaries	1-26-76
Tyler (Smith Co.)	Redistricting	2-25-76
Harris County	Precinct election judges	3-5-76 1/
Forney ISD* (Kaufman Co.)	Numbered posts, majority vote requirement	3-9-76
Texas City (Galveston Co.)	Numbered posts	3-10-76
Monahans (Ward Co.)	Numbered posts	3-11-76
Dumas ISD* (Moore Co.)	Numbered posts, majority vote requirement	3-12-76
Orange Grove ISD* (Jim Wells Co.)	Numbered posts	3-19-76
Pecos (Reeves Co.)	Numbered posts	3-23-76
Chapel Hill ISD* (Smith Co.)	Majority vote requirement	3-24-76
Hereford ISD* (Deaf Smith Co.)	Numbered posts	3-24-76
Luling (Caldwell Co.)	Numbered posts	3-29-76

* Independent School District

1/ Withdrawn 3-11-76

STATE: TEXAS

SUBDIVISION	OBJECTION	DATE OF OBJECTION
Lockney ISD* (Floyd Co.)	Numbered posts, majority vote requirement	3-30-76
San Antonio (Bexar Co.)	Thirteen annexations	4-2-76 1/
Victoria County	Consolidation of two school districts	4-2-76 2/
Frio County	1973 Redistricting,	4-16-76
Liberty ISD* (Liberty Co.)	Numbered posts, majority vote requirement	4-19-76
Pettus ISD* (Bee Co.)	Numbered posts	5-5-76
Lockhart (Caldwell Co.)	Majority vote requirement	5-11-76
Rusk (Cherokee Co.)	Numbered posts	5-17-76
Trinity ISD* (Trinity Co.)	Numbered posts	5-21-76
Hereford ISD* (Castro, Deaf Smith & Parmer Cos.)	Numbered posts, majority vote requirement	5-24-76
Crockett County	Redistricting	7-7-76
Waller County	Redistricting of commissioner and justice of the peace precincts	7-27-76
Marshall ISD* (Harrison Co.)	Majority vote requirement	7-29-76
Midland ISD* (Midland Co.)	Numbered posts, majority vote requirement	8-6-76 3/
Uvalde County	Redistricting	10-13-76

* Independent School District

1/ Withdrawn 1-24-77

2/ Withdrawn 8-16-76

3/ Withdrawn 11-13-78

STATE: TEXAS

SUBDIVISION	OBJECTION	DATE OF OBJECTION
Woodville (Tyler Co.)	Numbered posts	11-12-76
Hawkins ISD* (Wood Co.)	Numbered posts	11-18-76
Westheimer ISD* (Harris Co.)	Special election implementing Westheimer ISD	1-3-77
South Park ISD* (Jefferson Co.)	Numbered posts	2-25-77
Somerset ISD* (Atascosa and Bexar Cos.)	Numbered posts	3-17-77
Ralls ISD* (Crosby Co.)	Majority vote requirement	3-22-77
Lufkin ISD* (Angelina Co.)	Numbered posts and majority vote requirement	3-24-77
Raymondville ISD* (Willacy Co.)	Polling place	3-25-77
Comal ISD* (Comal Co.)	Numbered posts	4-4-77
Prairie Lea ISD* (Caldwell Co.)	Numbered posts	4-11-77 1/
Fort Bend County	Polling places	5-2-77
Clute (Brazoria Co.)	Majority vote requirement	6-17-77
Caldwell County	Redistricting	8-1-77
Lamar CISD** (Fort Bend Co.)	Bilingual Oral Assistance Program	10-3-77 2/

* Independent School District
** Consolidated Independent School District

1/ Withdrawn 3-3-78

2/ Withdrawn 11-15-77 after modifications to program procedures

STATE: TEXAS

SUBDIVISION	OBJECTION	DATE OF OBJECTION
Fort Worth ISD* (Tarrant Co.)	At-large system to combination of at-large (2) seats & single-member (7) seats, staggered terms for the single-member districts	1-16-78 1/
Harris County	Polling place for Precinct 55	3-1-78
Waller CISD** (Waller Co.)	Election date	3-10-78
Nueces County	Redistricting	3-24-78
Southwest Texas Junior College District (Wade & Zavala Cos.)	Polling place location	3-24-78
Port Arthur (Jefferson Co.)	Consolidation of Cities of Lakeview and Pear Ridge with the City of Port Arthur and proposed redistricting of residency districts	3-24-78
Neches (Anderson Co.)	Numbered posts and majority vote requirement	4-7-78
Medina County	Redistricting	4-14-78
Edwards County	Redistricting	4-26-78
Aransas County	Redistricting	4-28-78
Corsicana ISD* (Navarro Co.)	Numbered posts and majority vote requirement	4-28-78

* Independent School District

**Consolidated Independent School District

1/ Withdrawn 2-17-78

STATE: TEXAS

SUBDIVISION	OBJECTION	DATE OF OBJECTION
Harris Co. Board of School Trustees	Election date	5-1-78
Brazos County	Redistricting	6-30-78 1/
Jim Wells County	Redistricting	7-3-78
Ector County ISD* (Ector Co.)	Numbered posts, majority vote requirement	7-7-78
Harrison County	Redistricting	8-8-78
Terrell County	Redistricting	12-27-78
Hereford ISD* (Deaf Smith Co.)	Numbered posts	1-18-79
Beeville (Bee Co.)	At-large elections	2-1-79
Alto ISD* (Cherokee Co.)	Numbered posts, majority vote requirement	5-11-79
Houston (Harris Co.)	Fourteen annexations	6-11-79 2/
San Antonio (Bexar Co.)	Polling place	8-17-79 3/
Comal ISD* (Comal Co.)	Numbered posts	9-12-79
Lockhart (Caldwell Co.)	Home Rule Charter	9-14-79
Taylor (Williamson Co.)	Polling place	12-3-79
Atascosa County	Redistricting	12-7-79
Medina County	Redistricting	12-11-79

*Independent School District

1/ Withdrawn 11-15-78

2/ Withdrawn 9-21-79 upon adoption of hybrid 9-5 plan

3/ Withdrawn 3-24-80

STATE: TEXAS

SUBDIVISION	OBJECTION	DATE OF OBJECTION
Port Arthur (Jefferson Co.)	Referendum election	12-21-79
La Porte (Harris Co.)	Home Rule Charter	12-27-79
Port Arthur (Jefferson Co.)	Referendum election	1-15-80
Harris Co. School District	Election date change	1-17-80
Comal County	Redistricting	2-1-80
Jim Wells County	Redistricting additional voting precincts and polling places	2-25-80
Corpus Christi ISD* (Nueces Co.)	Apportionment plan: Four single member districts, three at-large	4-16-80
Nacogdoches ISD* (Nacogdoches Co.)	Apportionment plan: Five single member districts, two at-large	4-3-80
Port Arthur (Jefferson Co.)	Referendum election procedures	7-23-80
Cleveland ISD* (Liberty Co.)	Numbered posts	8-8-80
Jim Wells County	Redistricting	8-12-80

* Independent School District

CHART COMPARING NUMBER OF CANDIDATES WHO RAN FOR OFFICE AND NUMBER ELECTED, BOTH MEXICAN AMERICAN AND ANGLOS SINCE 1938

Election Date	No. of Candidates	No. of Mexican American Candidates	No. of Persons Elected	No. of Mexican Americans Elected	Write-in Candidates	No. of Mex.-Amer. Write-in Candidates
April 5, 1938	8	0	3	0	0	0
April 2, 1940	6	0	3	0	0	0
April 7, 1942	3	0	3	0	0	0
April 6, 1944	3	0	3	0	0	0
April 2, 1946	3	0	3	0	0	0
April 6, 1948	3	0	3	0	0	0
April 4, 1950	3	0	3	0	1	0
April 1, 1952	6	0	3	0	3	0
April 6, 1954	5	0	3	0	11	0
April 3, 1956	3	0	3	0	4	0
April 1, 1958	6	0	3	0	0	0
April 5, 1960	4	0	3	0	0	0
April 3, 1962	4	0	3	0	1	0
April 7, 1964	7	2	3	0	15	1
April 5, 1966	3	0	3	0	0	0
April 7, 1968	3	0	3	0	5	0
April 4, 1970	3	0	3	0	1	0
April, 1972	4	0	3	0	7	3
April, 1973	7	2	2	0	9	2
April, 1974	6	1	3	0	0	0
April, 1975	2	0	2	0	0	0
April, 1976	7	0	3	0	0	0
April 2, 1977	15	1	2	0	36	0
April 1, 1978		3	4	1	8	1
					36	7
	119	9 (7.6%)	70	1 (1.4%)	138	22 (16.1%)

TURNOUT-OUT RATES 1970-1978

YEAR	TOTAL	S.S.	%	NON SPANISH SURNAME	%
1970	478	64	13.39	414	86.61
1972					
April	840	N/A	--	N/A	--
Sept.	243	40	19.70	203	83.54
1973					
February	349	57	16.33	292	83.67
April	1275	417	32.71	858	67.29
1974	1021	197	19.29	824	80.71
1975	176	10	5.68	166	94.32
1976	1168	402	34.42	766	65.58
1977	1067	233	21.84	834	78.16
1978	1993	660	33.12	1333	66.88

REGISTRATION RATE 1970-1976-1977

YEAR	TOTAL REGISTERED VOTERS	S.S. REGISTERED VOTERS	%	NON SPANISH SURNAME	%
1970	2640	559	22.69	2041	77.31
1977	3267	974	29.81	2293	70.19

COMPARISON OF REGISTERED VOTER RATE
AND TURN OUT RATE FOR
SPANISH SURNAMED VOTERS

YEAR	REGISTERED	TURNOUT
1970	22.69	13.39
1977	29.81	21.84

COMPARISON OF % OF VOTES RECEIVED BY SPANISH SURNAMED VOTES CANDIDATE AND % OF VOTES CAST BY SPANISH SURANMED VOTES

YEAR	CANDIDATE	% S.S. VOTER	%VOTES REC'D. BY S..S. CANDIDATES
1964	Tamayo	-	-
1964	Pastrano	-	-
1973	Rangel	30.33	32.36
1973	Serrato	30.33	29.16
1974	Cano	19.29	31.34
1977	Pruneda	21.84	23.52
1978	Ruiz	33.12	32.21
1978	Rangel	33.12	32.87
1978	Salazar	33.12	30.21

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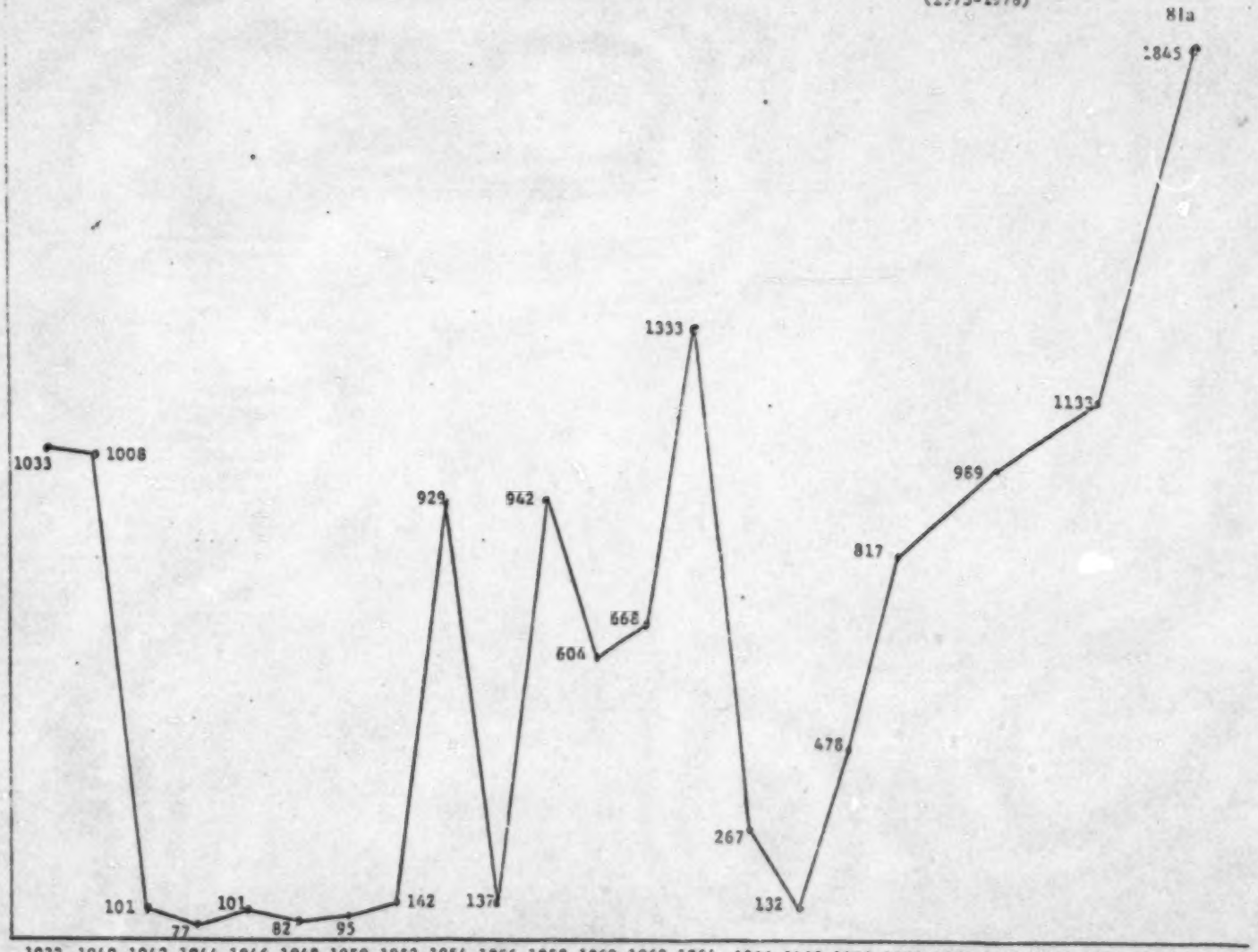
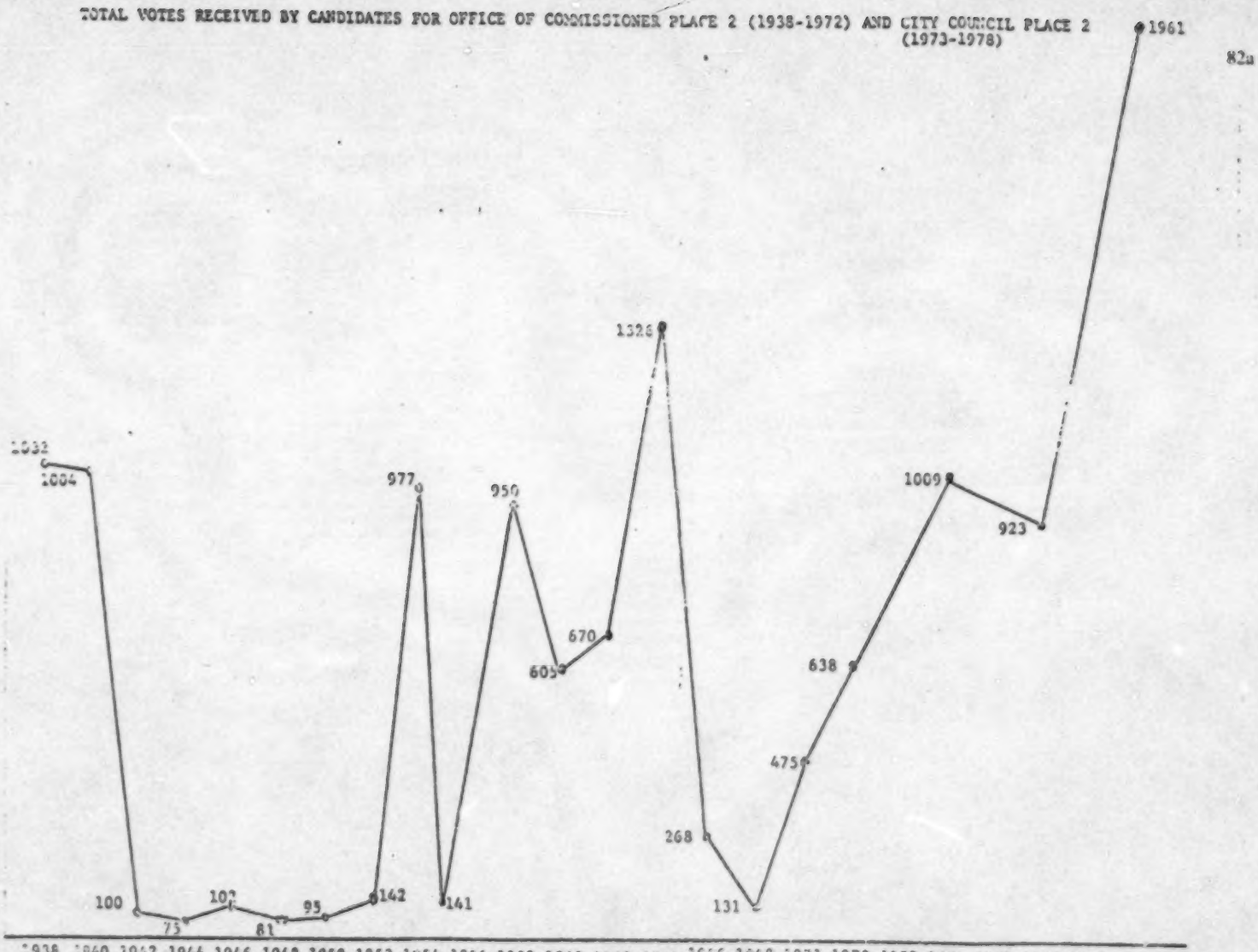
Defendant-Intervenor's Exhibit No. 3a

TOTAL VOTES RECEIVED BY CANDIDATES FOR OFFICE OF COMMISSIONER PLACE 1 (1930-1972) AND CITY COUNCIL PLACE 1 (1973-1978)



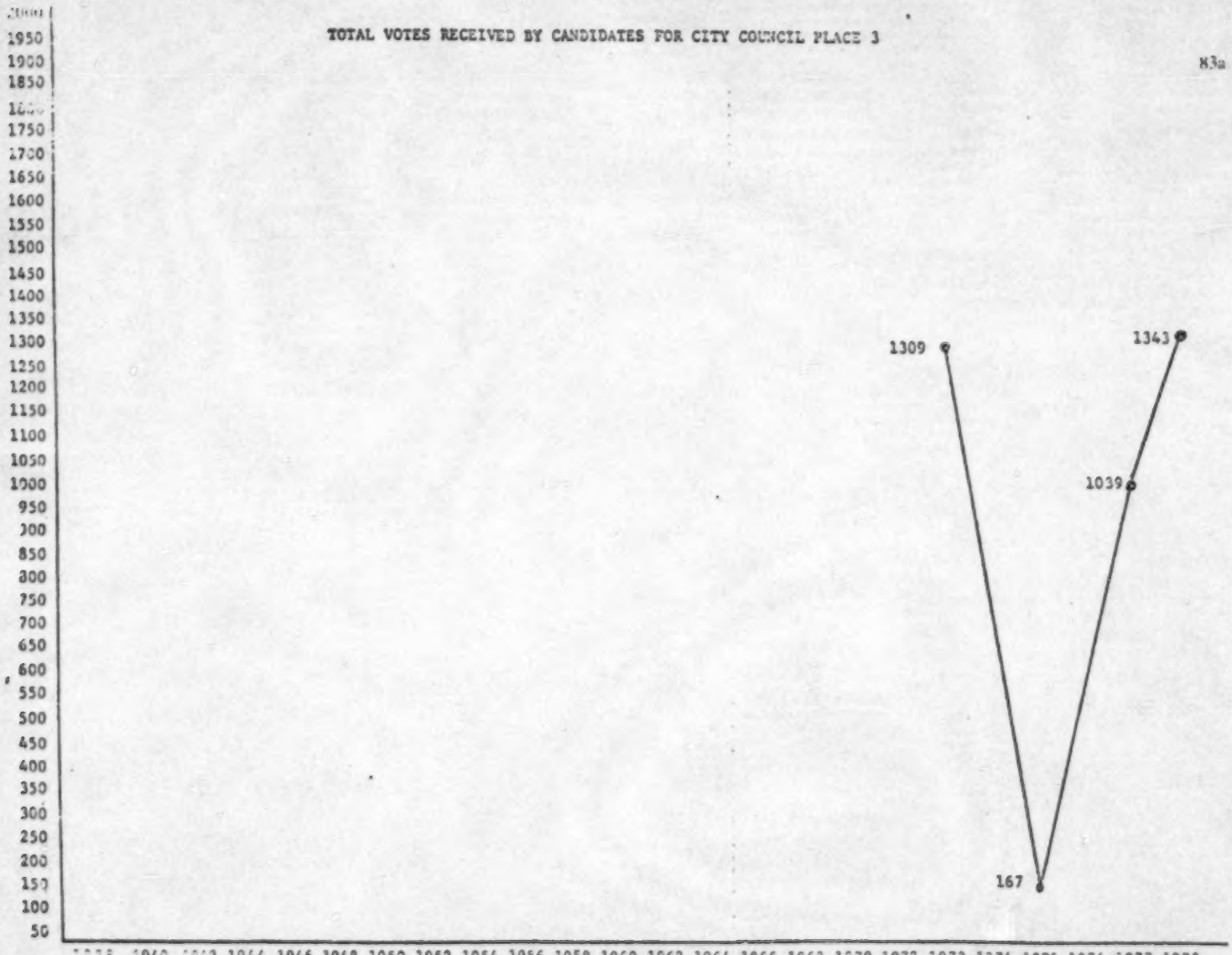
● Indicates races in which there were Mexican American candidates.

TOTAL VOTES RECEIVED BY CANDIDATES FOR OFFICE OF COMMISSIONER PLACE 2 (1938-1972) AND CITY COUNCIL PLACE 2 (1973-1978)



● Indicates races in which there were Mexican American candidates.

TOTAL VOTES RECEIVED BY CANDIDATES FOR CITY COUNCIL PLACE 3



● Indicates races in which there were Mexican American candidates.

TOTAL VOTES RECEIVED BY CANDIDATES FOR OFFICE OF COMMISSIONER PLACE 4 (1938-1972) AND CITY COUNCIL PLACE 4 (1973-1978)

● Indicates races in which there were Mexican American candidates.

Chart Showing Office Holders for Lockhart City Commission From 1938 - 1972

Year	Mayor	Commissioner Place 1	Commissioner Place 2
1938	Nye H. Clark	W.M. Carpenter	H.A. Rader
1940	Sam H. Tabor	R.A. Beatty	R.F. Leyendecker
1942	Sam H. Tabor	R.A. Beatty	R.F. Leyendecker
1944	Sam H. Tabor	R.A. Beatty	R.F. Leyendecker
1946	Sam H. Tabor	R.A. Beatty	R.F. Leyendecker
1948	Sam H. Tabor	R.A. Beatty	R.F. Leyendecker
1950	Sam H. Tabor	R.A. Beatty	R.F. Leyendecker
1952	Sam H. Tabor	R.A. Beatty	R.F. Leyendecker
1954	William George Richards	R.A. Beatty	Alvin A. Kruez
1956	Sam J. Glosserman	R.A. Beatty	Alvin A. Kruez
1958	Sam J. Glosserman	William E. Chesser	Alvin A. Kruez
1960	Sam J. Glosserman	William E. Chesser	J.D. Andrews
1962	Sam J. Glosserman	William E. Chesser	J.D. Andrews
1964	J.F. (Jim) Dickens	William E. Chesser	J.D. Andrews
1966	J.F. (Jim) Dickens	William E. Chesser	J.D. Andrews
1968	W.E. Chesser	W.P. Kirskey	C.E. Royal
1970	W.E. Chesser	W.P. Kirskey	C.E. Royal
1972	W.E. Chesser	W.P. Kirskey	C.E. Royal

Defendant Intervenor's Exhibit #15

Brief for the United States

Office - Supreme Court, U.S.
FILED
JAN 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-802

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF LOCKHART, APPELLANT

v.

UNITED STATES OF AMERICA and ALFRED CANO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

BRIAN K. LANDSBERG
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether the district court correctly concluded that appellant failed to show that its adoption in 1973 of a home rule charter providing for the election at large of four council members to numbered posts for staggered terms did not have the effect of abridging the voting rights of Mexican Americans in violation of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

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TABLE OF AUTHORITIES

Cases:

Allen v. *State Board of Elections*, 393 U.S. 544 ..... 7, 9
Beer v. *United States*, 425 U.S. 130 ..... 5, 6, 10, 11
Cano v. *Chessar*, No. A-79-CA-032 (W.D. Tex. Mar. 2, 1979) 4
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City of Rome v. *United States*, 446 U.S. 156 10
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United States v. *Sheffield Board of Commissioners*, 435 U.S. 110 8
White v. *Regester*, 412 U.S. 755 10

Statutes:

Voting Rights Act, Section 5, 42 U.S.C. 1973c 2, 3, 4, 5, 6, 7, 8, 9, 10
Pub. L. No. 94-78, 89 Stat. 402, 405 3
28 U.S.C. 2106 12

Miscellaneous:

H. R. Rep. No. 94-196, 94th Cong., 1st Sess. (1975) 10
S. Rep. No. 94-295, 94th Cong., 1st Sess. (1975) 10
U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (1975) 10

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-802

CITY OF LOCKHART, APPELLANT

v.

UNITED STATES OF AMERICA and ALFRED CANO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The district court's opinion, which is reproduced at J.S. App. 2a-37a, is not yet reported.

JURISDICTION

The order of the three-judge court, convened pursuant to 42 U.S.C. 1973c, was entered July 30, 1981 (J.S. App. 38a). The City of Lockhart filed its notice of appeal on October 28, 1981 (J.S. App. 39a). This Court's jurisdiction is invoked under 42 U.S.C. 1973c.

STATEMENT

1. Facts and Procedural History

The City of Lockhart brought this suit in February 1980, under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, seeking a declaratory judgment that the electoral changes in its Home Rule Charter adopted in 1973 had neither the purpose nor the effect of abridging the voting rights of Mexican-American citizens (J.S. App. 2a).

Lockhart is located in Caldwell County, Texas, approximately thirty miles south of Austin (J.S. App. 3a). In 1970, the City's population of 6,489 persons was 45% Anglo, 41% Mexican American, and 14% black (*ibid.*). Nine hundred and seventy four of the 3,267 registered voters in Lockhart in 1977, approximately 30%, were Mexican Americans (*ibid.*). There is a clear pattern of racial bloc voting in Lockhart (*id.* at 6a).

Until 1973, Lockhart was what Texas state law defines as a "general law" city with a commission form of government (J.S. App. 3a). It was thus required by state law to have a mayor and two commissioners elected every two years on an at-large basis (*id.* at 3a-4a). Although Texas law makes no provision for numbered posts for the two commissioners, Lockhart had utilized a numbered post system since 1917 (*id.* at 12a).[1]

In 1972, the City authorized a study of the feasibility of changing from "general law" to "home rule" status by adoption of a home rule charter (J.S. App. 4a-5a). Under Texas law, "home rule" cities

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[1] That system required candidates for election to the city commission to specify which one of the two commission offices they were seeking (J.S. App. 4a).

may use an electoral system of their choosing, not inconsistent with state law, including either at-large or single-member districts, numbered posts, and staggered terms (*id.* at 4a). The City appointed a fifteen-member charter study committee (all of whom were later elected as a commission to draft the charter), consisting of nine Anglos, four Mexican Americans, and two blacks (*id.* at 5a). Modeling its proposal on the charter of Gonzalez, Texas, this group proposed the charter that Lockhart's voters adopted on February 20, 1973 (*ibid.*). That charter provides for a council-manager system with a mayor and four councilmembers elected at large to numbered posts (*ibid.*).[2] The councilmembers serve staggered terms, with two elected one year, and the other two elected the next year (*ibid.*).

In 1977, four Mexican Americans brought a federal suit challenging the constitutionality of Lockhart's system of electing its city council. *Cano* v. *Kirksey*, No. 77-CA-133 (W.D. Tex. July 15, 1977) (J.A. App. 5a-6a). In the course of that litigation it was revealed that the City had never sought the Attorney General's approval of the 1973 electoral changes, as required by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c (*id.* at 6a).[3] A second suit was

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[2] The district court found that the principal difference between the charter of Gonzalez and the charter proposed by Lockhart's charter drafting commission was that the latter included an express numbered post provision for its four councilmembers (J.S. App. 5a).

[3] Pursuant to the 1975 amendments to the Voting Rights Act, Pub. L. No. 94-73, 89 Stat. 402, 405, the State of Texas and the City of Lockhart are subject to the preclearance requirement of Section 5 for any electoral changes made after November 1, 1972.

filed and the district court entered an injunction against elections in Lockhart until the 1973 electoral changes received Section 5 approval. *Cano* v. *Chessar*, No. A-79-CA-032 (W.D. Tex. Mar. 2, 1979) (*ibid.*).

On May 7, 1979, the City submitted its 1973 voting changes to the Department of Justice and, following the receipt of additional information from the City, the Assistant Attorney General interposed an objection to the plan on September 14, 1979 (J.S. App. 6a).

On September 10 and 11, 1980, the three-judge district court conducted the trial on the City's claim for a declaratory judgment. The court limited the proceedings to a determination of whether the 1973 changes had the effect of denying or abridging the right to vote (J.S. App. 2a). On July 30, 1981, the court, with one judge dissenting, issued its opinion holding that the City had failed to prove the absence of the prohibited discriminatory effect (*id.* at 2a-37a).

2. The District Court's Opinion

The starting point for the district court's analysis was its recognition of the City's burden in this Section 5 declaratory judgment suit to demonstrate that the 1973 electoral changes have neither the purpose nor the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group (J.S. App. 2a). The court confined its inquiry to the issue of discriminatory effect, since a failure by the City to prove the absence of such an effect would make an inquiry into purpose unnecessary (*ibid.*).

The court found that elections in Lockhart are characterized by a high degree of racial bloc voting, noting that while Mexican Americans constitute more

than 40% of the City's population, only one Mexican American has ever held elective office in Lockhart (J.S. App. 7a).[4] On the basis of election results, the court found that where Mexican-American candidates faced three or fewer Anglo opponents, they invariably were defeated since "single shot" voting was ineffective in that situation (*id.* at 7a-8a).[5]

Examining the numbered post and staggered term features of Lockhart's 1973 charter, the court determined that both undercut the electoral power of Mexican Americans in Lockhart's at-large system by reducing the size of the candidate field and highlighting the individual candidates for each position (J.S. App. 8a).

The district court majority rejected the City's argument that the numbered post provision was not a "change" reviewable under Section 5 because Lockhart had used numbered posts prior to November 1, 1972 (J.S. App. 10a-14a). Distinguishing this Court's decision in *Beer* v. *United States*, 425 U.S. 130 (1976), the district court found that the num-

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[4] The single successful Mexican-American candidate was Bernardo Rangel, who was elected to the council in 1978 in a contest against four Anglo candidates. Of the 1,993 voters in that election, 660 were Mexican Americans, and Rangel received 655 votes. The district court concluded that the similarity of these numbers was "clearly indicative of racial bloc voting", and that Rangel won because the Anglo vote was split among four candidates (J.S. App. 7a).

[5] "Single shot" voting occurs where a minority group concentrates all its votes on one candidate and the split of the majority group's vote among several candidates gives the minority candidate the plurality to win. Lockhart's election returns suggested to the court that single shot voting could result in the election of a Mexican American only in races with five or more candidates (J.S. App. 7a).

bered post provision was not a mere continuation of the City's pre-1973 practice, but was a specific feature of the home rule charter's new council-manager form of government expressly approved by the City's voters in 1973 (J.S. App. 11a).[6] The court also determined that it must analyze the numbered post provision in the context of the increase in council seats from two to four and with the staggered term feature (J.S. App. 14a). In that context, the court concluded that "the provision for an additional two numbered posts in conjunction with the provision for staggered terms has a synergistic discriminatory effect" (*ibid.*). Accordingly, the court concluded that the electoral system established in Lockhart's 1973 home rule charter is impermissibly retrogressive, see *Beer* v. *United States*, *supra*, 425 U.S. at 141, because the ability of Mexican Americans to participate in the political process and to elect their choices to office is diminished by the numbered post and staggered term provisions (J.S. App. 16a). Thus, the court denied the City's request for a declaratory judgment under Section 5 (*ibid.*).

The dissenting judge found no impermissible retrogression resulting from Lockhart's adoption of the home rule charter (J.S. App. 18a). While acknowledging the theoretical potential for dilution created by numbered posts and staggered terms (*id.* at 24a-26a), the dissent concluded that the numbered post provision was not a "change" within the meaning

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[6] Moreover, the court found that the pre-1973 numbered posts were illegal under Texas law (*id.* at 12a) and, thus, the court treated the numbered post provision as though it had not existed before it was adopted legitimately under Texas law in the 1973 home rule charter (*id.* at 12a-13a).

of Section 5 (*id.* at 27a-33a), and the use of staggered terms did not discernibly diminish the electoral power of Mexican Americans (*id.* at 34a-37a). Accordingly, the dissenting judge would have reopened the proceedings for the parties to submit evidence on the question of discriminatory purpose (*id.* at 37a).

ARGUMENT

Applying this Court's well-settled teachings to the facts in the record, the district court correctly concluded that the City was obligated to submit the 1973 electoral changes in its home rule charter for preclearance under Section 5. In order to obtain declaratory relief, it was necessary for the City to demonstrate that the changes had neither the purpose nor the effect of abridging minority voting rights. Because we agree with the analysis of the dissenting opinion below regarding the issue of discriminatory effect, we urge this Court to vacate the judgment below and remand the case to permit the district court to receive evidence on the issue of discriminatory intent.

1. In *Allen* v. *State Board of Elections*, 393 U.S. 544, 565-566 (1969), this Court expressed its understanding that the Voting Rights Act "gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.'" Thus, the Court in *Allen* concluded that Congress intended that all electoral changes, no matter how small, be subjected to Section 5 scrutiny. 393 U.S. at 568.

The threshold question—whether the adoption by Lockhart of a "home rule" charter in 1973 amounted to an electoral change sufficient to trigger Section 5 scrutiny—was correctly decided by the district court.

Lockhart's shift from a "general law" city governed by a mayor and two at-large commissioners each elected to numbered posts, to a "home rule" city governed by a council-manager system with four at-large councilmembers, elected to numbered posts for staggered terms, is clearly a change in method of governance that falls within the ambit of Section 5. See, *e.g.*, *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110 (1978); *Horry County* v. *United States*, 449 F. Supp. 990 (D.D.C. 1978). In 1972-1973, Lockhart named a charter commission to study whether to change the City's then existing "general law" status to "home rule" status, thereby permitting adoption of any electoral system not specifically prohibited by state law. The charter commission recommended, and the City residents approved by referendum, that Lockhart make such a change. A new "home rule" charter was then drawn up providing a number of features, including the at-large election of four councilmembers elected to numbered posts for staggered terms. The fact that features of the new "home rule" charter were in many respects similar to the electoral system employed by Lockhart in previous years does not negate that a cognizable change in the form of city government did occur. That change—even with the retention of some particulars of the earlier electoral system—compelled Section 5 review.[7] In addition, as

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[7] *United States* v. *Sheffield Board of Commissioners*, *supra*, also involved an objection to a feature in the new system of governance (at-large elections) that had existed in the prior system. 435 U.S. at 114-116. While no party contended that this was not a "change," this Court, in upholding the Attorney General's power to object to the new system, implicitly found the at-large feature to be an appropriate subject for Section 5 preclearance.

the majority noted, "the validation of the previously illegal numbered posts represents a change in voting procedure" (J.S. App. 13a).

2. On the second day of trial, September 11, 1980, the district court announced that it would bifurcate the proceedings and receive evidence first on the issue of discriminatory effect, reaching the question of impermissible purpose only if the court concluded that the 1973 charter provisions lacked the proscribed effect.[8] J.S. App. 2a. By deciding that Lockhart's change had an unlawful discriminatory impact, the majority found the intent inquiry unnecessary. The dissenting member of the court, however, disagreed on the initial question, and, therefore, he would have reopened the proceedings to decide the purpose question. J.S. App. 37a. We believe the dissent is correct.

This Court has recognized that the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 569; *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964). Accordingly, it has stated that the purpose of Section 5 of the Voting Rights Act is "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the

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[8] The court decided to confine its initial inquiry to the issue of discriminatory effect when counsel for the defendant-intervenors sought to explore Lockhart's prior electoral history for the purpose of showing that the 1973 charter was enacted with discriminatory intent (Tr. 233-235, 242-244). The district court determined that litigation of the intent question should be deferred, and that, if necessary, the court would allow the parties to reopen discovery on that subject at a later time (Tr. 244).

electoral franchise." *Beer* v. *United States*, *supra*, 425 U.S. at 141; *City of Rome* v. *United States*, 446 U.S. 156, 185 (1980).

All three members of the district court acknowledged the potential adverse effects of numbered posts and staggered terms where there is an established pattern of racial bloc voting (J.S. App. 15a, 25a-26a). Indeed, both Congress in its consideration of the Voting Rights Act and this Court have recognized that numbered posts and staggered terms may have a discriminatory impact on minority voting rights in certain circumstances. See S. Rep. No. 94-295, 94th Cong., 1st Sess. 27-28 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 19-20 (1975); *City of Rome* v. *United States*, *supra*, 446 U.S. at 183-185; *White* v. *Regester*, 412 U.S. 755, 766 (1973). See also U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* 206-208 (1975). However, as the dissenting judge recognized here, there must be more than *potential* dilution to invalidate an electoral change under Section 5 (J.S. App. 26a). This Court has held that Section 5 forbids only those changes that lead to an actual "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" (*Beer* v. *United States*, *supra*, 425 U.S. at 141), or that were enacted with the purpose of abridging voting rights (*City of Rome* v. *United States*, *supra*, 446 U.S. at 172).

The evidence supports the dissenting judge's view that there has been no actual retrogression resulting from Lockhart's adoption of the 1973 home rule charter. Prior to adoption of the charter, Lockhart elected two members of its governing body in even-numbered years to numbered posts. Under the charter, two additional officials are elected in the same manner in

odd-numbered years. While elections are conducted twice as often, there is no diminution of minority voting strength, because every year Mexican-Americans would occupy the same relative position they formerly did in every alternate year. As the dissent points out, correctly in our view (J.S. App. 36a):

> The pivotal consideration here is that while minorities cannot—because council seats are numbered—resort to single-shot balloting in councilmanic elections, the stark fact is that they never could, for the non-mayoral seats have always been numbered. And it seems obvious that the charter provision for elections to the two new council seats in odd-numbered years—and its accompaniment, the staggering of terms—will tend no more to highlight racial identities of candidates for those seats than did the pre-charter practice of filling the two original seats through elections in even-numbered years. The election procedures for both pairs of seats are identical, and no diminution in minority voting power is discernible.[9]

The district court's bifurcation of this case was certainly within its discretion, see, *e.g.*, *Beer* v. *United States*, *supra*, 425 U.S. at 136 & n.7. Its failure was in wrongly deciding the "effects" issue and thereby failing to address as well the equally important "purpose" issue. In the circumstances, we hesitate to urge the Court to note probable jurisdiction and undertake plenary review on the merits at this time. Judicial economy would be best served in our opinion by vacating the decision below and re-

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[9] It is not insignificant that in 1978, after adoption of the home rule charter, a Mexican-American accomplished what had not occurred in the prior years and for the first time won an election in Lockhart (J.S. App. 7a).

manding to permit the district court to consider the question of discriminatory intent. While much of the evidence already before the court bears at least as much on the question of intent, the district court would have to permit the parties to introduce additional evidence consistent with its original bifurcation order. This Court would then be free to review the case in its entirety at a later date. Accordingly, we recommend that the Court exercise its authority under 28 U.S.C. 2106 to vacate the judgment below and to remand the case for further proceedings on the question of discriminatory purpose. See *United States* v. *Fruehauf*, 365 U.S. 146 (1961).

CONCLUSION

The judgment of the district court should be vacated and the case remanded for further proceedings on the issue of discriminatory purpose.

Respectfully submitted.

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Motion to Dismiss or Affirm

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No. 81-802

IN THE

Supreme Court of the United States

CITY OF LOCKHART,

Appellant,

v.

UNITED STATES and ALFRED CANO,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

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No. 81-802

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1981

CITY OF LOCKHART,

Appellant,

vs.

UNITED STATES OF AMERICA

and

ALFRED CANO,

Appellees.

On Appeal From the United States District Court For The District of Columbia

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APPELLEE'S MOTION TO AFFIRM

Appellee, Alfred Cano, pursuant to Rule 16(c) of the Rules of the Supreme Court, moves the Court to affirm the District Court's July 30, 1981 Order dismissing this case. In this declaratory judgment action, Appellant City of Lockhart

sought approval of the election provisions of its Home Rule Charter pursuant to the Section 5 preclearance provisions of the Voting Rights Act, 42 U.S.C. § 1973(c). The District Court denied preclearance for reasons set out in its Memorandum Opinion entered July 30, 1981. The District Court decision is based upon well established precedent and thus no substantial question on the merits has been raised in this appeal. Since there is no need for further argument, the judgment should be affirmed for the reasons set out in this motion.

STATEMENT OF THE CASE

The City of Lockhart initiated this action pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c), on February 2, 1980.[1] Lockhart sought a declaratory judgment that a 1973 Home Rule Charter altering the City's form of government and election structure was not adopted pursuant to a discriminatory purpose and did not discriminate on the basis of race, color or membership in an applicable

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[1] Prior to the commencement of this action, in proceedings initiated by private litigants, the United States District Court for the Western District of Texas determined that the adoption of the Home Rule

language minority group. (R. Complaint for Declaratory Relief)[2] In this action, the City has the affirmative duty of demonstrating the absence of discrimination in both purpose and effect. Beer v. United States, 425 U.S. 130, 140-141 (1976).

Prior to February 20, 1973, the City of Lockhart, as a Texas general law city, was governed by a commission form of government. (App. 4a) A general law city in

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Charter was subject to the Section 5 preclearance provisions of the Voting Rights Act and enjoined the City from utilizing the unprecleared election change. Cano v. Chesser, No. A-79-CA-0032 (W.D. Tex. Mar. 2, 1979). Contrary to Appellant's assertion, the Court order in Cano did not preclude the use of the prior governance in subsequent city elections. Following the Texas District Court's determination, the City of Lockhart submitted the Home Rule Charter to the Attorney General for Section 5 review. The Attorney General interposed a letter of objection to the Home Rule Charter election provisions on September 14, 1979.

[2]Citations in the form of "R.___" are to documents in the record, as specified. Citations in the form of "App.___" are to the opinion of the three-judge District Court below, reprinted in the Appendix to the Jurisdictional Statement.

Texas has the authority to govern itself only in the manner specifically authorized by Texas law, Davis v. Coffee City, Texas, 356 F. Supp. 550, 554 (E.D. Tex. 1972). The City of Lockhart thus had no control over the size of its governing board or the method of election of that board. (App. 3a) Texas law requires that the commission consist of three members, a mayor and two commissioners. (Art. 1158 Tex. Rev. Civ. Statutes) Moreover, state law does not authorize election features such as single member districts, numbered posts, residency districts, staggered terms, or majority vote requriements. (Id.) Contrary to state law, however, until 1973 the City of Lockhart had required candidates for election to the commission to designate the "post" to which the candidate sought election. (App. 4a)

The Home Rule Charter in 1973 expanded the authority of the governing body by providing for a council-manager form of government. The council consisted of a mayor and four council members. In adopting Home Rule status, the City of Lockhart had the opportunity to choose any of a number of election schemes, including "pure" at-large elections. (App. 4a) Instead, the new

Charter's election provisions called for at-large election to the council with a numbered post provision and staggered terms for councilmanic candidates, with elections for two council members in each year.

The District Court tried this case on the merits on September 10 and 11, 1980.[3] After a day of trial, the District Court limited the evidentiary presentation to the issue of discriminatory effect. (App. 2a)[4] To rebut the City's evidence, Appellees introduced evidence concerning the discriminatory effect of the numbered place system and staggered terms in the context of the racially polarized voting patterns which are prevalent in Lockhart. This evidence is summarized below.

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[3]Intervenor Cano was allowed to intervene as a party defendant on May 7, 1980, and participated in the trial.

[4]As previously mentioned, p. 2 supra, the City is under a duty to demonstrate the absence of both discriminatory purpose and effect with respect to the adoption and maintenance of the Home Rule Charter. A failure to meet either branch of this dual burden requires denial of the requested declaratory judgment. Consequently, in order to facilitate the consideration of this case and to save judicial resources, the Court bifurcated the trial and heard evidence only on the question of discriminatory effect. (App. 2a)

Although the population of Lockhart is well over half minority--including approximately 41% Mexican Americans and 14% blacks (App. 3a)--minorities have historically been excluded from Lcokhart's governing body. No minority candidate had ever won election to the Board of Commissioners before 1973 and the only one elected to the Council since the 1973 Charter change owed his success to an unusual fragmentation of the vote for Anglo candidates. (App. 7a)[5] Trial testimony showed that Lockhart's minority communities could not elect candidates of any race who would serve their minority interests, and that governing board members were therefore able to ignore minority needs, and did. (R. Rangel Deposition, pp. 9-11, 19, 21-22)

A strong pattern of racial bloc voting characterizes elections in the City of Lockhart. Lockhart does not deny the existence of polarized voting, and all members of the panel of the Court below found such a pattern. (App. 6a, 24a) Election returns from municipal elections since 1973 show a close correspondence between Spanish-

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[5]Four different Anglo candidates opposed the lone Mexican American, Mr. Rangel, in the 1978 election. Although the four

surnamed voters who voted in the particular election and the number of votes received by the Mexican American candidate, indicating that Anglo voters do not vote for Mexican American candidates.[6]

The Home Rule Charter adopted in 1973 included two specific features in Lockhart's city elections which have the effect of diminishing minority voting strength: numbered posts and staggered terms. The discriminatory effect of both features results partly from their tendency to reduce or eliminate the successful use of "single shot" voting by minorities. As both the majority opinion and the dissent below noted, such voting constitutes an effective means for numerical and racial minorities to avoid their "submergence" which ordinarily accompanies at-large election schemes, Chapman v. Meier, 420 U.S. 1, 16 and n. 10 (1975), especially in the context of racially polarized voting, White v. Regester, 412 U.S. 755, 766-69 (1973). (App. 7a-8a, 25a and n. 29)

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gathered twice as many votes as Rangel, no one of them outpolled him. (R. Def. Exh. 14)

[6]In 1978, the three Hispanic candidates (one for Mayor and two for council

The imposition of numbered posts reduced the field of candidates and at the same time highlighted the racial identity of individual candidates for each position. Given Lockhart's pattern of racially polarized voting, this racial highlighting exposed the minority candidates to racially biased bloc voting opposition. (R. Rangel Deposition, p. 22; Trial Transcript, pp. 247-249) The imposition of a numbered place system also nullified the advantages of single-shot voting for minorities by reducing its impact. (R. Trial Transcript, p. 139) That impact will be much greater when the single minority beneficiary competes against a larger number of Anglo candidates for a number of seats, rather than a smaller number for a single numbered place. (R. Trial Transcript, pp, 138-40)[7] All these factors were operative in Lockhart.

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positions) received 655 votes, 642 votes, and 602 votes respectively, in an election in which 660 Hispanics voted (out of 1,993 voters). (App. 7a, R. Def. Exh. 14) In 1973, 417 Mexican American voters went to the polls; the two Mexican American candidates received 445 and 401 votes. (R. Def. Exh. 14) In 1977, when 233 Mexican Americans voted, the Mexican American candidate for Place 3 received 251 votes. (Id.)

[7]Mr. Bernard Rangel's testimony indicates

The adoption of staggered terms also adversely affected minority voting strength in Lockhart. By limiting the number of seats open for election in a given year, staggered terms highlighted and increased the visibility of a particular race, and thus enhanced the likelihood of racial targeting against candidates. (R. Trial Transcript, p. 149) They also had the effect of creating lower voter turnout, which the evidence showed disproportionately and adversely affected minority voters. (R. Trial Transcript, pp. 256-58)[8]

The discriminatory effects of numbered places and staggered terms in Lockhart are seen in the electoral record since 1973. Seven Hispanics have run for the Commission since 1973; yet, only one Mexican American has been elected, in unusual circumstances involving a close four-way split of the

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that his race for City Council in 1973 became a head-to-head contest with an Anglo candidate as a result of the place system. Moreover he testified that with a numbered post system "...the political system is still going to throw you the best [opposition]..." and thereby target a minority candidate. (Rangel Deposition, pp. 21-22)

[8]Voter turnout data for the 1974 and 1977 elections, which were held subsequent to the adoption of the Home Rule Charter,

Anglo vote. (See p. 6 , n. 5, supra) Indeed, in that same election, two other Mexican American candidates lost because their advantages of single-shot voting support were insufficient to prevail against Anglo voting support that was divided among "only" three non-minority candidates. (App. 7a, R. Def. Exh. 14)

After considering this evidence, the District Court found that Appellant had failed to show that the numbered post and staggered term provisions of the Home Rule Charter lacked discriminatory effect; on the contrary, it found that those features had a discriminatory effect on Lockhart's Mexican American voters. (App. 16a) Because in the view of the majority those features were changes in election laws subject to Section 5 preclearance, declaratory judgment was denied. (App. 16a-17a) The objection issued earlier by the Attorney General therefore remains in effect, blocking further use of those features of the election

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show that low voter turnout adversely affects Mexican American candidates. In 1977, 24% of Mexican Americans and 36% of other registered voters cast ballots. But in 1975, when only 176 ballots were cast in uncontested City elections, only 10 or 5.7% were cast by Mexican American voters. (See R. Def. Exh. 14)

system.[9]

ARGUMENT

I. LOCKHART FAILED TO CARRY ITS BURDEN TO PRECLEAR ELECTION CHANGES COVERED BY SECTION 5.

The decision below correctly held that both the numbered post system and the staggered terms introduced by the 1973 Home Rule Charter were changes in election practices subject to Section 5 preclearance. It further agreed with the Attorney General's earlier determination that those changes had a discriminatory effect on minorities and therefore could not be precleared. These rulings were plainly correct, and present no substantial issues for review.

A. The Numbered Post System And The Staggered Terms Provision Were Changes Subject To Section 5 Preclearance.

At the threshhold, Lockhart argues that the numbered post provision was not subject to preclearance under Section 5 of the

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[9]The Attorney General's letter of objection does not purport to suspend the operation of the City's entire Home Rule Charter, cf. Appellant's Jurisdictional Statement, pp. 14-15, but only the offensive election changes. (R. Def. Exh. 12, p. 2)

Voting Rights Act, 42 U.S.C. § 1973c. (Lockhart does not contest the applicability of Section 5 to the staggered terms provision.) The Court below correctly held that both features of the Charter were election law changes requiring submission and preclearance.

1. Under Section 5, a covered political subdivision in Texas must submit to the United States Attorney General or to the United States District Court for the District of Columbia all changes in election laws or practices since November 1, 1972, and must obtain a determination that such election changes were not adopted pursuant to a discriminatory purpose and do not discriminate on the basis of race, color or membership in an applicable language minority group. Briscoe v. Bell, 432 U.S. 404 (1977).

Congress crafted Section 5 to provide a comprehensive framework for federal scrutiny of election practices in covered jurisdictions which might have the purpose or effect of discriminating against minority voters. In extending Section 5, Congress saw it as "the front line of defense against voting discrimination," S. Rep. No. 94-295 (1975), 2 U.S. Code Cong. & Admin. News,

94th Cong., 1st Sess., 774, 784 (1975). At the same time, Congress took specific and approving note of the broad reading given Section 5 by the Supreme Court in Allen v. Board of Elections, 393 U.S. 544, 566 (1969), which held that section should be given the "broadest possible scope," and in Perkins v. Mathews, 400 U.S. 379, 387 (1971), which reiterates Allen's holding that all changes, no matter how minor, are covered by the preclearance requirement. See, S. Rep. 94-295, supra, p. 782; H.R. Rep. No. 94-196, 94th Cong., 1st Sess. (1975), p. 9.[10] Legislation which embodies a powerful remedial intent, so clearly expressed and reconfirmed by Congress, should not be hamstrung by narrowing technical constructions. See, Briscoe v. Bell, supra, 432 U.S. at 410; United States v. Board of Commissioners of Sheffield, 435 U.S. 110, 124 (1978); Phillips v. Walling, 324 U.S. 490, 492 (1975).

Congress specifically intended Section 5 to stand as a safeguard against discriminatory use of at-large elections, numbered post systems, and staggered terms--the

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[10] This Court reasserted its steadfast view of Section 5's comprehensive scope in United States v. Board of Commissioners of Sheffield, Ala, 435 U.S. 110, 122 (1978).

essential elements of the election system embodied in Lockhart's 1973 Home Rule Charter. Congress extended Section 5 to cover Texas in large part because

> [t]he at-large structure, with accompanying variations of the majority run-off, numbered place system, is used extensively among the 40 largest cities in Texas....These structures effectively deny Mexican American and black voters in Texas political access....When numbered posts are combined with a majority vote requirement, the change for a minority candidate becomes practically impossible unless minorities are in a voting majority.

S. Rep. No. 94-295, supra, p. 794 and n. 17; H.R. Rep. No. 94-196, supra, p. 19 and n. 21. In documenting the need for Section 5's extension to Texas, both House and Senate Committees reported with concern on local Texas jurisdictions' discriminatory use of staggered terms and numbered place systems, S. Rep. No. 94-295, supra, pp. 783, 794; H.R. Rep. No. 94-196, supra, pp. 10, 18-19. Both Committee reports cite with approval a federal court decision nullifying as discriminatory, on constitutional grounds, a 1972 City Charter conversion by the City of Nagodoches from an

at-large commission form of government to a numbered place system,[10] while noting that Section 5 is needed to replace just such time-consuming and expensive constitutional litigation. See S. Rep. No. 94-295, supra, pp. 793, 777-78; H.R. Rep. No. 94-196, supra, pp. 19, 4-5. In short, it is clear that Congress extended Section 5 to cover Texas for the express purpose of subjecting to federal scrutiny systems like that adopted by Lockhart in 1973.

2. This Court has firmly established that Section 5 requires scrutiny of election changes which substitute home rule government for general law government, United States v. Board of Commissioners of Sheffield, supra, and of changes to numbered posts and staggered terms in a jurisdiction which uses at-large elections characterized by racial bloc voting, City of Rome v. United States, 446 U.S. 156, 183 (1980).[11] See also, White v. Regester, 412 U.S. 855, 766 (1973) (finding of constitutional violation in Texas at-large system based in part on the use of numbered posts).

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[10] Weaver v. Muckleroy, Civ. No. 5524 (E.D. Tex. 1975)

[11] The Court in Rome attributed much of the discriminatory effect of these election practices to their undermining of single-shot voting by minorities. 446 U.S. at 184 and n. 19.

Appellant seeks to evade these holdings by arguing that there was no post-1972 "change" to trigger Section 5 review, relying on Beer v. United States, 425 U.S. 130, 138-39 (1976).

Appellant argues that preclearance was unnecessary for the numbered place system because Lockhart utilized a numbered place system prior to November 1, 1972[12] in a different form and as part of a different election system for a different number of positions. Appellant also asserts that the illegality of its use of a numbered place system prior to the adoption of the Home Rule Charter[13] is irrelevant to the issue of Section 5 coverage. (Jurisdictional Statement, pp. 9-10)

In Beer v. United States, supra, this Court held Section 5 inapplicable to an election system, in existence since 1956, which continued in effect without change

[12] In Texas, those laws affecting voting which were enacted prior to November 1, 1972 are exempt from Section 5 preclearance. 42 U.S.C. § 1973(c), Beer v. United States, supra.

[13] The District Court majority found that Lockhart's use of numbered places before 1973 was illegal under Texas law, App. 11a-13a, and Appellant has not challenged that finding here.

or re-adoption after Section 5 became applicable. The ordinance under scrutiny in Beer was a post-census redistricting for the City of New Orleans which changed the boundaries of five single member districts but did not alter, or even refer to, the City's two at-large districts. This Court concluded that the at-large districts, although potentially discriminatory, were beyond Section 5's reach because they had "existed without change since 1954," 425 U.S. at 139.

Appellant's reliance on the Beer holding is misplaced. Lockhart's enactment of a new Charter in 1973 providing for a numbered post system constituted a "change" which triggers Section 5 coverage. Prior to 1973, Lockhart's use of numbered posts was ultra vires and therefore, under Texas law, void. (App. 12a-13a) With the adoption of the Home Rule Charter, the City affirmatively adopted a lawful numbered place system for the first time. See, 1973 Home Rule Charter, Section 3.01. (R. Def. Exh. 7) The legalization of the numbered post feature was a significant change. The adoption of a Home Rule Charter, valid under State law, which included the numbered post system, foreclosed to the minority commun-

ity of Lockhart a state-law challenge to that discriminatory election feature, which would otherwise be available. In contrast, New Orleans' redistricting ordinance did not mention the at-large districts; and indeed, not an ordinance but a referendum would have been required to change the New Orleans City Charter.[14] Moreover, in New Orleans, the redistricting did not change the governing structure, of which the at-large seats were a part, in any way. However, Lockhart's Home Rule Charter fundamentally changed the form of government in which the numbered place system operated. It increased the number of such places from two to four and changed the places from Commissioners' seats in a commission form of governance to council members' positions in a mayor-council-manager form of government.

3. The numbered place system incorporated in Section 3.01 of the Charter is covered even if it did not, standing by itself, change the actual (although unauthorized) prior practice. The numbered place system

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[14]Lockhart could have chosen a number of other election systems (e.g., by-district, pure at-large, etc.) for its Home Rule Charter, but chose in 1973 to utilize numbered places. New Orleans' ordinance did and could not modify the form of elections.

was a part of a larger election and governance system which was comprehensively changed. Congress specifically intended that such overall changes in governance would trigger scrutiny of specific aspects of the governance system. As the 1975 Senate Committee Report noted,

> In some Section 5 cases, a change in the voting practice or procedure may also retain some features of the previous system, and all aspects of such a change are within the reach of Section 5.

S. Rep. No. 94-295, supra, p. 19 (emphasis supplied).[15] Such an application of Section 5 is consistent with the procedures adopted by the Attorney General in his administration of Section 5. Department of Justice officials, in testifying before Congress in connection with the 1975 extension of Section 5, introduced an exhibit which indicates a policy of objection to changes in governance where specific features in the

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[15]The Report cites with approval the District Court decision, 374 F. Supp. 363 (D. D.C. 1974), reversed in Beer, supra. This Court's reversal does not undercut the importance of the quoted passage. The error below in Beer was that there was no change in any "voting practice or procedure"; the Senate Committee's citation was therefore inapposite to its clear purpose as stated in the text.

change were objectionable. See testimony of Assistant Attorney General J. Stanley Pottinger at the Hearings of H.R. 939, et al., before the Subcommittee on Constitutional Rights, House Committee on the Judiciary, 94th Congress, 1st Sess., 166 (1975).[16] Although the Attorney General's application of Section 5 is not binding on this Court, the Court has given great deference to the interpetation of Section 5 made by the Attorney General, Perkins v. Matthews, supra, 400 U.S. at 390-394, particularly where Congress has manifested its approval of the Attorney General's interpretation, United States v. Board of Commissioners of Sheffield, supra, 435 U.S. at 131-32. The Attorney General's letter of objection to the numbered place provision of the Lockhart City Charter was fully consistent with an administrative policy approved by Congress.[17]

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[16]Exhibit 5 indicates several instances of Section 5 coverage and objections to the change in form of government as well as to specific features of the election change, i.e., Conyers City, Ga.; Lancaster County, South Carolina; and Charleston Co., South Carolina.

[17]In his letter of objection of September 14, 1979 (R. Def. Exh. 12), the Attorney General clearly based Section 5

This Court's decision in United States v. Board of Commissioners of Sheffield, Ala., supra, supports the District Court's analysis. In Sheffield, the City of Sheffield, by referendum held in 1975, altered its form of government from a commission form of government in which three commissioners were elected at-large, to a mayor-council form of government in which eight aldermen were to be elected at-large, by numbered posts. 435 U.S. at 114-15. The Attorney General then objected that

> while he did not interpose any objection to the change to a mayor-council form of government...to the proposed district lines or to the at-large election of the mayor and the president of the council, he did object to the implementation of the proposed at-large method of electing city councilmen because he was unable to conclude that the at-large election of councilmen required to reside in districts will not have a racially discriminatory effect.

Id., 435 U.S. at 116. The Supreme Court sustained the Attorney General's objection. The similarities in the facts of the present case and those in Sheffield are quite

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coverage on the fact that in adopting the Charter, Lockhart had altered its form of government and voluntarily adopted the entire election scheme in the Charter.

striking. In both instances the Attorney General and the District Court found objectionable a change in governance which included an election feature in use both before and after the change in the form of governance--in Sheffield, the at-large system, and in Lockhart the numbered post system. Thus the District Court was correct in simply adhering to a well-established application of Section 5 in reviewing the election features of a change in governance.

4. Appellant contends that this Court's decision in Perkins v. Matthews, supra, makes the illegality of Lockhart's pre-1973 use of numbered places irrelevant. In Perkins the Court examined an at-large system which was required by state law prior to the effective date of Section 5, but only implemented after that date. The Court, looking to the practice actually "in force or effect" prior to Section 5, held that implementation of the state law was a change covered by Section 5, 400 U.S. at 395. In so doing, the Court served Congress' purpose to assure broad Section 5 coverage of discriminatory election practices. It should not now turn Perkins on its head to circumvent that same purpose,

and need not do so, since as demonstrated above Lockhart did adopt election changes in 1973.

Under Section 5, failure to secure preclearance simply leaves a covered change unenforceable, 42 U.S.C. § 1973(c), Berry v. Dole, 438 U.S. 196 (1978). The submitting jurisdiction must, in the absence of preclearance, revert back to the former election scheme. City of Rome v. United States, supra, 446 U.S. at 182. The proper test of whether there has been a change affecting voting is whether, upon such reversion, the election scheme of the political subdivision would differ from that submitted for preclearance. In the instant case, Lockhart could not lawfully revert to use of a numbered post system in the absence of preclearance of Section 3.01 of its Home Rule Charter, since state law, absent a valid Home Rule Charter, does not authorize use of such a system. Absent preclearance, Lockhart's would be a pure at-large system, without posts. See pp. 4, 17, supra. Therefore the Home Rule Charter provision for numbered posts did change Lockhart's election practices.

B. Both The Numbered Post System And The Staggered Terms Provisions Have Discriminatory Effect On Mexican American Voters.

The District Court correctly found that both the numbered post system and the staggered terms provision "had and will continue to have" a discriminatory effect on Mexican American voters, in that it diminishes their ability to elect candidates of their choice. (App. 16a) Appellant does not contest the Court's finding as to ~~staggered terms~~ numbered posts. Lockhart concedes that staggered terms may have a discriminatory effect, but argues that such effect is hypothetical in its case (Jurisdictional Statement, pp. 12-15). Apart from the point that this local factual issue presents no substantial question warranting exercise of this Court's jurisdiction, Lockhart's position is unfounded; the Court's finding is amply supported in the record.

The testimony of the Appellant's expert witness, Dr. Dalbert Taeble, reveals that the effect of staggered terms is generally to decrease voter turnout. (R. Trial Transcript, pp. 83-84) According to Dr. Fred Cervantes, Appellee's studies of

voter turnout show that low voter turnout has a disproportionate effect on minority voters. When turnout is low, generally, turnout among minority voters is even lower. (See p. 9 and n. 8 , supra.) Voter turnout data made available by the City of Lockhart demonstrates that low voter turnout disproportionately affects minorities. (R. Def. Exh. 14)[18]

Staggered terms also have an adverse effect on the voting strength of minorities by facilitating the targeting of minority candidates. Testimony at trial revealed that staggered terms operate in the same discriminatory fashion as a numbered post provision in the context of racially polarized voting. (R. Trial Transcript, pp. 81,83,148,149) In Lockhart staggered terms have in fact had the effect of exacerbating racial tactics used against minority candidates. (Id. p. 245)[19]

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[18]See pp. 9-10, n. 8, supra.

[19]During the 1978 race an advertisement ran in the local paper which purported to link the three Mexican American candidates to the controversial Chicano political party, Raza Unida Party. (R. Def. Exh. 15) Mr. Bernard Rangel, in his deposition, testified that such a tactic was meant to arouse the white Anglo vote against the

The staggered terms provision did, therefore, bring about a "retrogression" in the political strength of Mexican American voters, as required by Beer v. United States, supra, 425 U.S. at 141. The retrogression is caused in at least two ways. First, the staggered terms are an integral part of a larger election change which, in the aggregate, significantly diluted minority voting strength, see p. 19 , supra. Second, the addition of two elections in odd-numbered years adversely affects minority voting in previously-scheduled, even-year elections, by creating more numerous and frequent elections, which exacerbates the phenomenon of low minority voter turnout. The minimal positive effect of the expanded number of seats does not offset this additional obstacle to minority voters' strength. (R. Trial Transcript,pp. 169-170) Appellant had the burden of demonstrating that the addition of staggered terms would not be retrogressive. Both the Attorney General and the District Court were properly unpersuaded.

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three Mexican American candidates. (R. Def. Exh. 15, Rangel Dep. pp. 25-26) The resulting turnout was in fact the greatest of any post-Charter election (Def. Exh. 14), and all three candidates were defeated.

II. THE DISTRICT COURT'S DENIAL OF PRECLEARANCE DID NOT INTERFERE WITH LOCKHART'S USE OF OTHER VALID PROVISIONS OF THE HOME RULE CHARTER.

Appellant also challenges as excessive the scope of the District Court's order denying declaratory judgment. Appellant apparently suggests that the District Court has invalidated its entire Home Rule Charter (Jurisdictional Statement, pp. 14-15). That suggestion is misleading. While it is true that adoption of the Home Rule Charter triggered Section 5 review, the District Court limited its review to the effect of the numbered post and staggered terms provisons. (R. Trial Transcript, pp. 183- 198) The District Court clearly indicated that other elements of the Charter were simply not before the Court for Section 5 review. (R. Trial Transcript, p. 199) Neither the trial on the merits nor the District Court's order addressed the discriminatory effect of any provision of the Charter, other than the two discussed at length above. While Appellant may have construed its suit as a request for a declaration that all aspects of the Charter were enforceable, denial of that judgment does not mean that all aspects were struck down. In sum, the District

Court's order cannot be read to invalidate the entire Home Rule Charter.

This conclusion is further supported by the fact that the Attorney General in his review of the submission of the Charter objected only to the specific election features and not to the entire Charter. (Def. Exh. 12, p. 2) Moreover, in response to a prior submission by the City of Lockhart of changes in the Charter which incorporated a majority vote provision along with a bilingual election provision, the Attorney General objected to the majority vote provision while approving the bilingual elections. (R. Def. Exh. 10, p. 2) Thus the prior actions of the Attorney General support the conclusion that both Appellant and the United States have conducted their business under Section 5 with the awareness that Section 5 submissions are ordinarily limited to election provisions, each of which is to be assessed separately.

Finally, the Charter itself provides for the separate review of its provisions. Section 11.07 of the City of Lockhart Home Rule Charter reads as follows:

> If any section or part of section of this charter shall be held invalid by a court of competent jurisdiction, such holding shall

not effect the remainder of this charter.

(R. Def. Exh. 7, p. 31)

Thus, the invalidation of the discriminatory election features incorporated in the Charter do not, by its own terms, affect the remainder of the Charter.

In view of the foregoing, the change to a council-manager form of government and the increase in the size of the governing board as well as other provisions of the Charter remain in effect. Only the numbered places and staggered terms are barred. This limited prohibition does not intrude inappropriately into the local management of political affairs beyond the scope of federal review.

Conclusion

The District Court correctly applied well-settled Section 5 principles in reviewing the numbered post and staggered terms provisions of the Lockhart Home Rule Charter. Neither the District Court's Order denying declaratory judgment nor Appellant's arguments raise any substantial issues of general importance. Plenary consideration is therefore unnecessary.

The District Court's order denying declaratory judgment should be affirmed.

DATED: December 30, 1981.

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Supplemental Brief

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No. 81-802

IN THE

Supreme Court of the United States

CITY OF LOCKHART,

Appellant,

v.

UNITED STATES and ALFRED CANO,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

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No. 81-802

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1981

CITY OF LOCKHART,

Appellant,

vs.

UNITED STATES OF AMERICA

and

ALFRED CANO,

Appellees.

On Appeal From the United States District Court For The District of Columbia

SUPPLEMENTAL MEMORANDUM OF INTERVENOR

Intervenor-Appellee Alfred Cano files this Supplemental Memorandum in support of his Motion to Affirm, pursuant to Rule 16.6 of this Court. This Supplemental Memorandum

addresses an intervening event not available on December 30, 1981: the partial reversal of position by Defendant-Appellee United States in its Memorandum filed January, 1982.

In its recent Memorandum, the United States reverses the position as to the discriminatory effect of Lockhart's election system that it had previously maintained throughout this litigation and the antecedent Section 5 proceedings. [1/] Until last month, the government had steadfastly maintained that the numbered place and staggered terms provisions of the 1973 Home Rule Charter could not be precleared under Section 5 because they are discriminatory in effect. On September 14, 1979, the Assistant Attorney General's letter of objection explicitly stated that Lockhart had failed to demonstrate that the election changes were without discriminatory effect. R. Def.

1/ The United States has not changed its position that the numbered place system was a change requiring Section 5 preclearance. Memorandum for the United States, pp. 7-8.

Ex. 12, p. 2. Thereafter, when Lockhart filed its declaratory judgment action in the District Court for the District of Columbia, the government defended on the ground that the Lockhart election system was discriminatory in effect. In its pre-trial Statement of Material Issues filed July 14, 1980, the government argued that Lockhart's system had an actual discriminatory effect. [2/] At trial held September 10-11, 1980, the government reasserted this position, which it submitted to the Court in its

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[2/] The Government urged the Court to find, not hypothetically but specifically and based on the record, that "the imposition of numbered posts and staggered terms in a context of racial bloc voting has an adverse impact on minority candidates, ... Cottrell Affidavit; Rangel deposition at 22-24; Fielder deposition at 58-59." Statement of Material Issues, p. 3.

Post-Trial Brief. [3] Indeed, the District Court's critical conclusion of law # 12, finding that Lockhart's system "has clearly had and will continue to have such an [discriminatory] effect on Mexican American voters" (App. 16a) was drawn verbatim from a proposal submitted by the United States. [4] But in January, 1982, the United States determined for the first time that the dissenting Judge, who had rejected the government's position, had been correct. Memorandum for the United States, pp. 9-11.

[3] Post-Trial Brief for the United States filed October 28,1980, pp. 10, 17. The Post-Trial Brief argues specifically, not hypothetically, that the numbered place and staggered term provisions had the effect of "diminish[ing]" Mexican Americans' participation in the political process in Lockhart, id. p. 17; and that Mexican Americans in Lockhart would have a "better ability" to participate in a political process free of numbered place and staggered term provisions, id.p. 10.

[4] United States' Proposed Findings of Fact and Conclusions of Law, filed October 28, 1980, p. 15. See also, Proposed Findings of Fact 30-32.

The Government's brief argues baldly that the dissent was correct in requiring actual, not merely potential, dilution of the minority's voting strength. Memorandum for the United States, p. 10. This argument is flatly contradictory to the government's prior submissions to the District Court, which were based explicitly on "the record before [that] Court", Post-Trial Brief of the United States, supra, pp. 10, 17, see also Statement of Material Issues, supra, and not merely on generalized findings by Congress or the Commission on Civil Rights.

The United States now purports to find no actual retrogressive effect in this record as required by Beer v. United States, 425 U.S. 130, 141 (1976). Memorandum for the United States at 10-11. Yet it points to no new factual discoveries or legal authority which would explain its reversal of position. Certainly the Beer citation provides no justification, since that decision was announced long before this litigation commenced and

the meaning of Beer was extensively argued below. The government specifically contended below that Lockhart's numbered place and staggered term provisions met Beer's retrogression test. See, e.g. Post-Trial Brief, supra, pp. 9-10.[5/]

The government's reversal of position, apparently on policy grounds, is also unusual in that it appears to seek broader vindication of Lockhart than the Appellant itself suggests. Lockhart's entire argument against the District Court's ruling on the numbered place system is a challenge to the holding that a covered election change had occurred. Jurisdictional Statement, pp. 8-12. The government urges reversal

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5/ In that brief, the government argued, as does Intervenor here (see Appellee's Motion to Affirm, p. 23), that absent preclearance Lockhart would have to revert to a system of at-large elections without numbered places, as required by Texas law, and that the imposition of numbered places was therefore retrogressive.

not of that holding, but of the further conclusion -- not directly challenged in Lockhart's Jurisdictional Statement -- that the numbered place system had a discriminatory effect. Memorandum for the United States, p. 11. The District Court made specific findings of fact (App. 8a) and conclusions of law (App. 4a) that the numbered past system in Lockhart was discriminatory, and that it was retrogressive under Beer (App. 16a). These holdings are based on the record in this case and should not be disturbed. Likewise, there is ample support in the record for the District Court's finding that the staggered term system was both discriminatory and retrogressive. See Appellee's Motion to Affirm, pp. 24-26.

CONCLUSION

The Memorandum for the United States offers no persuasive reason to reject the District Court's judgment. It should be affirmed.

DATED: February 12, 1982

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Appellant's Brief

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No. 81-802

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

City of Lockhart,
Appellant

v.

United States of America
and
Alfred Cano,
Appellees

On Appeal From the United States
District Court of the District of Columbia

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QUESTIONS PRESENTED

1. Whether the district court improperly denied preclearance under §5 of the Voting Rights Act in finding that the adoption of a home rule charter by the citizens of Lockhart, Texas, which retained the pre-charter election features of at-large elections using numbered places for election of councilmen, would have the effect of abridging the right to vote on account of race, color, or membership in a language minority group.

2. Whether the district court improperly denied preclearance under §5 of the Voting Rights Act of that portion of a home rule charter which created "off-year" elections for two newly-created places on an enlarged city council.

3. Whether the district court improperly denied preclearance of the entire home rule charter when it found the numbered place and staggered term features of the charter to be objectionable under §5 of the Voting Rights Act.

PARTIES TO THE PROCEEDING

The only parties to this proceeding are those whose names are contained in the caption of the case.

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OPINION BELOW

The opinion of the United States District Court for the District of Columbia in the case at bar is unreported. Pertinent papers of the lower court are reproduced in the Appendix to the Jurisdictional Statement (A.Jur.S.). They consist of the Memorandum Opinion of the court (A.Jur.S. 2a-37a) and the court's order (A.Jur.S. 38a).

JURISDICTION

Appellant, the City of Lockhart, brings this appeal from a Judgment of the United States District Court for the District of Columbia by which that court denied Appellant's request for a declaratory judgment that the adoption of a city charter by the City of Lockhart and the enlargement of the city council which accompanied such adoption do not violate §5 of the Voting Rights Act of 1965, 79 Stat. 439 (1965) as amended 89 Stat. 402, 42 U.S.C. §1973c (Supp. 1981) [hereinafter cited as Voting Rights Act]. The Judgment was entered on July 30, 1981, by the United States District Court for the District of Columbia, sitting as a three-judge court under the requirements of said statute (A.Jur.S. 38a). On September 22, 1981, Appellant filed in that court a Notice of Appeal (A.Jur.S. 39a). Jurisdiction is vested in this Court under §5 of the Voting Rights Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case focuses upon §5 of the Voting Rights Act, which is not set out verbatim here due to its length. It is reproduced in pertinent part in Appellant's Jurisdictional Statement (Jur.S. vi-vii). The home rule charter of the City of Lockhart, Texas, adopted in February, 1973 (Pl.Ex. 1; R. 36) is also involved in this case.

STATEMENT OF THE CASE

The City of Lockhart is a city of approximately 7,500 persons located in Caldwell County, Texas. In 1970, the population was 6,489, of whom 45% were Anglo, 41% were Mexican-American, and 14% were Black (A.Jur.S. 3a). Prior to February 20, 1973, the City of Lockhart was governed by a city commission, a form of government authorized by the general laws of Texas (A.Jur.S. 4a). As a "general law" city, Lockhart elected a mayor and two city commissioners for two-year terms every even-numbered year (A.Jur.S. 4a). The mayor and city commissioners were elected to fill designated places (the numbered place system) by a plurality vote (R. 30-31). Numbered places for elections to the office of city commissioner had been utilized, without question, challenge or objection, since at least 1917 (A.Jur.S. 23a and R. 18).

In July, 1972, the City Commission appointed a Charter Study Committee composed of fifteen persons, who were charged with the task of studying the desirability of adopting a home rule charter (R. 37). This fifteen-member Charter Study Committee was composed of nine Anglos, four Mexican-Americans, and two Blacks (R. 38). The Charter Study Committee recommended that a Charter Commission be formed to draft a home rule charter for the City of Lockhart (R. 43). Thereafter, in September, 1972, the citizens of Lockhart approved the creation of a Charter Commission and elected the same fifteen members to serve as "Charter Commissioners" (Pl.Ex. 4; R. 44).

The proposed home rule charter changed the city government in many ways unrelated to voting procedures. There were, however, proposed changes in the election system. The size of the governing body was

to be expanded from three (mayor and commissioners for place one and place two) to five (mayor plus councilmen for places one through four). The mayor and two councilmen for places one and two continued to run for two-year terms in elections held in even-numbered years just as they had in the past; the two new council positions (places three and four) were filled through elections held in odd-numbered years ("off-year elections"). Thus, the two new places filled in off-year elections created "staggered terms" in the new city council. The proposed charter retained the pre-charter plurality vote feature (Pl.Ex. 1; R. 36).

This proposed home rule charter was unanimously endorsed by both the Charter Commission and the City Commission, and the City Commission submitted it without change to the voters of Lockhart (R. 46). In February, 1973, a special charter election was held in which the charter was adopted by the citizens of Lockhart by a vote of 309 to 40 (R. 49; Pl.Ex. 7; R. 119; Joint Appendix (J.A.) 62a).

The mayor and councilmen for places one and two, who had been elected in 1972, continued to serve until 1974 (R. 49). The first election to fill the new positions (places three and four) was held later in 1973. Elections were held annually thereafter through 1978 (Pl.Ex. 7; R. 119; J.A. 62a).

At the time the home rule charter was adopted, Texas and its political subdivisions were not subject to the Voting Rights Act. When the 1975 Voting Rights Act Amendments were adopted, they were written to apply retroactively to any changes in regard to voting which were instituted after November 1, 1972, for covered jurisdictions. Voting Rights Act, 42 U.S.C. §1973c, 89 Stat. 402, 405 (Aug. 6, 1975). The Attorney Gen-

eral thereafter designated Texas and its political subdivisions to be covered jurisdictions. Thus, by the time the Voting Rights Act was extended to cover Lockhart, several elections had already been held pursuant to the charter. Nevertheless its adoption in 1973 was subject to preclearance because of the retroactive effective date of the Act.

In 1979, an action was filed against the City of Lockhart in the Western District of Texas seeking to enjoin the City from utilizing the election system established by the home rule charter until such charter received "preclearance" in accordance with §5 of the Voting Rights Act.[1] The district court granted the injunctive relief sought.[2] The City therefore submitted

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[1] In 1977 a group of Mexican-Americans including Intervenor Cano brought suit against the City under the 14th and 15th Amendments, alleging that the election procedures contained in the home rule charter unconstitutionally diluted minority voting rights. That case is still unresolved, pending the outcome of the instant case. In that case, as in this case, the Mexican-American plaintiffs seek judicial imposition of single-member districts. *Cano v. Chesser*, A-77-CA-133 (W.D. Tex. July 15, 1977). The City of Lockhart has urged throughout this entire litigation that that case provides the only proper vehicle for resolution of the question of voting dilution alleged to exist in Lockhart.

[2] *Cano v. Chesser*, A-79-CA-032 (W.D. Tex. March 2, 1979). The language of the temporary restraining order, moreover, was broad enough to preclude elections under either the pre-charter system or the charter system, because the temporary restraining order prohibited use of numbered places. The City's request for a temporary restraining order which would have allowed elections under the pre-charter system was denied. Since neither the prior electoral system nor the charter election system could be followed, no elections have been held since the restraining order was entered. After this Court noted

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the home rule charter to the Attorney General for §5 review. At that time the Attorney General did not object to the adoption of the charter as such or to the City's home rule status, but did object to the at-large election feature,[3] the numbered place feature, and the "staggered term" provisions.[4] The City therefore

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probable jurisdiction in the instant case, the intervenor applied to the local district court in *Cano v. Chesser*, A-79-CA-032 (W.D.Tex. March 2, 1979) for imposition of a court-ordered system of single-member *district* elections, until this preclearance action is resolved. The City has responded by again requesting the district court to modify its order to allow elections under the pre-charter plan, under the authority of *City of Rome v. United States*, 446 U.S. 156, 183, 100 S.Ct. 1548, 1565, 64 L.Ed.2d 119, 143 (1980).

[3] At trial the Attorney General abandoned its objections to retention of the at-large feature. See Post-Trial Brief of the United States, p. 18:

> We recognize, however, that the City may desire to retain home rule status and for that reason may desire to amend the home rule election plan to eliminate the discriminatory features. If the numbered posts and staggered term provisions are eliminated, we believe that the home rule election plan could pass the Section 5 test.

After Lockhart sought Supreme Court review of the district court's ruling, the Attorney General agreed that numbered places and staggered terms, in the context of Lockhart's adoption of a home rule charter, had no discriminatory effect. *See* Memorandum for the United States, p. 11.

[4] Unlike the situation in the *City of Rome v. United States*, 446 U.S. 156, 183, 100 S.Ct. 1548, 1565, 64 L.Ed.2d 119, 143 (1980), the Attorney General has not at any point offered to preclear any technical amendments to the city charter which would allow elections under the pre-existing voting system. Thus, the impact of the court's order was to effectively preclude elections under either the new system or the old system. *See* note 2, *supra*.

brought this action for declaratory relief as to those features.

In the course of trial, the three-judge court limited consideration to the question of whether adoption of the home rule charter had a discriminatory "effect," reserving until a later time the question of discriminatory "purpose," should it be necessary to reach that issue (A.Jur.S. 2a). On the question before it—discriminatory effect—the court was divided. The majority found the numbered places and staggered terms to be changes with discriminatory impact. It also apparently held that since one or more features of the home rule election plan could not be approved, that the City was required to return to its pre-charter general law status under the commission form of government. Chief Judge Spottswood W. Robinson, III, in dissent, found that the numbered place feature was not a "change" within the ambit of §5, and that staggered terms had no negative effect on the right to vote under the circumstances of their origin in Lockhart. Chief Judge Robinson limited his inquiry to the aspects of the home rule charter that related to actual voting practices.

SUMMARY OF ARGUMENT

I. The district court erred in holding that the adoption of a charter retaining at-large elections with numbered places was somehow a "change" which had negative impact on minority voting rights. Retention of the numbered place feature of Lockhart's at-large election system did not constitute a change within the purview of the Voting Rights Act of 1965, and since there was no change the district court improperly held that that feature of the home rule charter was subject to the Voting Rights Act. Moreover, there was no dilutionary

effect in utilizing the numbered places in the two new councilmanic positions.

II. The charter system enlarged the City's governing body by two places which were to be filled in "off-year" elections. The district court ruled that these off-year elections created "staggered terms" which had impermissible negative impact under the Voting Rights Act. The district court improperly held that the election of councilmen to the newly-created posts in an off-year election had dilutionary effect on minority voting rights.

III. The district court took a unique and inappropriate step in formulating its declaratory judgment in such a way as to refuse preclearance to not only the voting features of the home rule charter, but also to the charter in its entirety. This attempt by the district court to reduce the City of Lockhart to general law status is unauthorized and inappropriate under the Voting Rights Act of 1965.

ARGUMENT

I. *THE DISTRICT COURT ERRED IN REFUSING PRECLEARANCE ON THE BASIS OF THE RETENTION OF THE NUMBERED PLACE FEATURE.*

A. The district court improperly held that retention of the numbered place feature under the home rule charter constituted a "change" triggering §5 review.

Since at least 1917 Lockhart has chosen the members of its governing body through at-large elections, with candidates filing for either mayor, commissioner (place one) or commissioner (place two). When the

charter was adopted in 1973, the election of these officers was carried forward without change. The mayor and two city councilmen continued to be elected every even-numbered year. The two new councilmanic places (places three and four) were filled in elections in odd-numbered years. Thus the use of numbered designations for the two new posts was entirely consistent with pre-charter election procedures.

In considering this continued use of numbered places, the court below was divided. The majority, without any reference to specific Texas law,[5] first determined that numbered places, although used without challenge for more than fifty years, were illegal in a general law city in Texas. It then proceeded to measure the charter election system, not against the pre-charter system actually in use, but against the pre-

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[5] The general law statutes of Texas provided for a governing body consisting of a mayor and two commissioners. *See* Art. 1158, Tex.Rev.Civ.Stat.Ann. (1963) enacted 1909: "[T]here shall at such elections be elected a mayor and two commissioners . . ." No further guidance is given regarding election procedures, and cities in Texas have used pure at-large, numbered-place, and named-place systems without challenge since that time (R. 37-38). The general law statutes do not specify any particular electoral procedure for the two commissioners. Appellant vigorously disputes the lower court's legal conclusion that the use of numbered places in a general law city was illegal. Even the Justice Department's expert witness on Texas municipal law conceded that there is no Texas case law on point, and that the general laws of Texas do not say *how* the two commissioners are to be elected (J.A. 20a, 29a). Assuming, *arguendo*, that the numbered place feature was illegal before the Charter, it is nevertheless incorrect to treat the numbered place feature as if it did not exist. *See* Dissenting Opinion (A.Jur.S. 31a), and text accompanying notes 6 and 7, *infra*.

charter system it felt *should have* been used. A "change" to numbered places from the ideal "pure" at-large system it thus posited had discriminatory effect.

Chief Justice Robinson, in dissent, looked to the legislative history of the Voting Rights Act and this Court's decisions in *Beer v. United States* and *Perkins v. Matthews*,[6] and concluded that the purpose of §5 was to prevent *actual* erosion of minority voting power. He recognized that use of numbered posts (and staggered terms) has a potential for diminishing the political effectiveness of minorities, but nevertheless limited the inquiry, in accordance with *Beer*, to whether changes were retrogressive as compared to the prior system actually in use (A.Jur.S. 30a). With respect to the use of numbered places, he refused to reach the issue of prior "illegality" under Texas law. Focusing on the voting system that was actually in use for places one and two during the prior half-century, he found there was no "change" in retaining the numbered place feature in the charter.

In its conclusion that retention of the numbered place feature was a "change" triggering §5 review, the opinion of the majority below is contrary to both the letter and spirit of the Voting Rights Act, and inconsistent with rulings of this Court in *Beer* and *Perkins v. Matthews*. The crucial language of the Act refers to "standard, practice or procedure with respect to voting *different from* that in force or effect on November 1, 1972." (emphasis added). This clearly re-

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[6] *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976) [hereinafter cited as *Beer*]; *Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971) [hereinafter cited as *Perkins v. Matthews*].

fers to actual, not imagined, "changes." This Court acknowledged in *Beer* and in *South Carolina v. Katzenbach*,[7] that the purpose of the Act was to "freez[e] election procedures in the covered areas unless the *changes* can be shown to be nondiscriminatory."[8] The *Beer* opinion further recognized the legislative purpose of §5:

> Section 5 was intended 'to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new discriminatory procedures and techniques.' S.Rep. No. 94-295, p. 19, U.S. Code Cong & Admin. News 1975, p. 785.[9]

In *Beer*, the City of New Orleans adopted a redistricting plan ("Plan II") for the five single-member councilmanic districts, but made no change regarding two pre-existing at-large seats. Although the redistricting increased voting power of the Black minority, it did not go as far as it might have to eliminate the disadvantages confronting Black voters in New Orleans. After the Justice Department interposed an objection, the three-judge court in the District of Columbia denied preclearance, finding discriminatory effect both in the redistricting plan in issue (Plan II) and in retention of the at-large positions.[10] The Supreme Court

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[7] *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1976).

[8] *Beer v. United States*, *supra*, 425 U.S. at 140, 96 S.Ct. at 1363, 47 L.Ed.2d at 639 (emphasis added).

[9] *Beer v. United States*, *supra*, note 6, 425 U.S. at 140-141, 96 S.Ct. at 1363, 47 L.Ed.2d at 639 [bracketed portion by the Court].

[10] *Beer v. United States*, 374 F.Supp. 363, 402 (D.D.C. 1974), *rev'd*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976).

reversed on both issues, and on appeal even the Attorney General conceded that the district court's holding on the at-large districts was incorrect.[11]

Two principles emerge from *Beer* which are applicable to this case. First, in upholding Plan II's districts, the decision indicates that the key inquiry is into whether there is *actual retrogression* in the voting power of minorities. Plan II in New Orleans, like the Lockhart election plan, was to be compared, not to some theoretical norm which would maximize or optimize minority voting power, but rather to the prior system actually in effect.[12]

Second, in its treatment of the two at-large seats, *Beer* holds that for §5 to be invoked there must be a "change" in a voting practice. The at-large seats had been in existence since 1954, and their retention in New Orleans' new electoral system did not trigger §5 review. [D]iscriminatory practices . . . instituted prior to November 1964 . . . are not subject to the requirement of preclearance [under §5]."[13]

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[11] *Beer v. United States, supra* n. 6, 425 U.S. at 138, 96 S.Ct. at 1362, 47 L.Ed2d at 638.

[12] *Beer v. United States, supra* n. 6, 425 U.S. at 141, 96 S.Ct. at 1363, 47 L.Ed.2d at 639.

[13] *Beer v. United States, supra*, n. 6, 425 U.S. at 138, 96 S.Ct. at 1362, 47 L.Ed.2d at 638. As noted above in text accompanying note 11, the Attorney General agreed in the *Beer* appeal that this holding was correct. Similarly, in the instant case the Attorney General now agrees that none of the changes in Lockhart's election system under the home rule charter had deleterious effect on minority voting strength. Memorandum for the United States, p. 10-11. This position is consistent with the position the Attorney General took on oral argument in *United States v. East Baton Rouge Parish School*

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In the instant case, the lower court has erred by measuring the new voting system against some optimal, hitherto unused system, and by concluding that voting dilution has resulted. It thus has mistakenly resurrected its improper approach in *Beer*. In that case, the court erroneously held that the at-large districts in New Orleans were discriminatory voting devices which could not be allowed to persist even though they pre-dated the date of coverage (November, 1964). In Lockhart the allegedly discriminatory device is numbered places, and again the lower court has rejected a voting feature which long pre-dated the adoption of Lockhart's charter.

The district court, however, asserts that the alleged "illegality" of the pre-charter numbered places distinguishes them from the "proper" at-large seats in issue in *Beer*. The charter's "validation" of the prior illegal practice is said to make Lockhart's situation "completely dissimilar" from the *Beer* at-large districts (A.Jur.S. 13a).

This analysis by the district court conflicts with this Court's decision in *Perkins v. Matthews*.[14] In that case, voters and candidates for city offices sought to enjoin the 1969 elections in Canton, Mississippi, alleging changes which triggered the Voting Rights Act and lack of preclearance. Prior to 1962, aldermanic elec-

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District, 594 F.2d 56 (5th Cir. 1979), in which a school board elected at-large was expanded by one seat. The Attorney General cleared this expanded board, but later attacked the at-large election feature. In argument on appeal the Attorney General stated that the change could be approved without approving the underlying plan, and the Fifth Circuit noted that, under *Beer*, validity of the underlying plan *could not have been considered* in the §5 action. *Id.*, 594 F.2d at 60.

[14] *Perkins v. Matthews*, *supra*, n. 6.

tions in Canton, Mississippi, were conducted by wards. In 1962, a state statute mandated change from the ward system to elections at-large. In 1965, Canton held its aldermanic elections by wards, ignoring the state-mandated system. Then in 1969, Canton made the change and was prepared to conduct elections at-large in compliance with the state statute. Plaintiffs sought to enjoin the new election system, alleging that elections at-large would be a change from the procedure in force and effect as of November 1, 1964, the effective date of the original Voting Rights Act.

The issue in this Court was whether the procedure "in force or effect" on November 1, 1964, was the procedure technically required by state law or, instead, was the procedure which in fact had or would have been employed, had an election been held that year. If the Court looked to the procedure required by state law, the City's use of that same procedure again in 1969 could not constitute a change. However, the Court concluded as follows:

> In our view, Section 5's reference to the procedure 'in force or effect on November 1, 1964,' must be taken to mean the procedure that would have been followed if the election had been held on that date.[15]

Following that principle, this Court concluded that since Canton elected its aldermen by wards in the June, 1965, municipal election (as it had in elections before that time), there was no reason to believe that a different procedure would have been in effect if the elec-

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[15] *Perkins v. Matthews, supra*, n. 6, 400 U.S. at 394, 91 S.Ct. at 440, 27 L.Ed.2d at 488.

tions had been held in November, 1964.[16] Importantly, for the instant case, the Court in *Perkins v. Matthews* acknowledged that it was focusing upon the system actually in use:

> [W]e conclude that the procedure *in fact* 'in force or effect' in Canton on November 1, 1964, was to elect aldermen by wards. That sufficed to bring the 1969 change within §5. As was the case in Allen [vs. Board of Elections, 393 U.S. 544, 89 S.Ct. 817 (1969)], 'it is clear, however, that the new procedure with respect to voting is different from the procedure in effect when . . . [Canton] became subject to the act . . .' (emphasis by the Court).[17]

As Chief Judge Robinson states it,

> The significance of *Perkins* for the case at hand can hardly be mistaken. . . . The case now before us is much stronger, for we know that Lockhart actually had assigned post-numbers to the two original seats on its governing body, and had done so for more than a half-century before the home-rule charter came about. No less in Lockhart than in Canton, it is 'the procedure *in fact* in force or effect,' whatever its legal status under state law, that measures the coverage of Section 5 (A.Jur.S. 30a).

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[16] *Perkins v. Matthews, supra,* n. 6, 400 U.S. at 395, 91 S.Ct. at 440, 27 L.Ed.2d at 488-89.

[17] *Perkins v. Matthews, supra,* n. 6, 400 U.S. at 395, 91 St. Ct. at 440, 27 L.Ed.2d at 489.

The Voting Rights Act therefore does not force the Court to analyze state law to determine what procedures should have been followed. The term "standard, practice, or procedure with respect to voting" clearly suggests that electoral rules may include even informal customs. The inquiry thus should end when it is recognized that numbered places had been used in Lockhart for more than a half-century. Numbered places in Lockhart's charter were no more a change than retention of the at-large seats in New Orleans' redistricting plan in *Beer*. If the numbered place feature was in actual use before, and simply carried forward, then it cannot be a "change" under *Perkins* or "retrogressive" under *Beer*. The district court has repeated the error it made in the *Beer* decision in identifying change where there is none, and in doing so has unnecessarily and improperly broadened the scope of §5 review.

B. The district court improperly determined that retention of the numbered place feature in the two new council positions diluted minority voting strength.

The district court majority attempted to provide an alternative basis for rejection of the numbered place feature. Noting that the new plan requires elections every year, as opposed to every other year under the old plan, the court concluded that adding the two new numbered places "affects twice as many elections for a larger number of positions" (A.Jur.S. 14a). Thus, the two additional numbered posts, in conjunction with the staggered terms created by off-year elections, was held to have a "synergistic discriminatory effect" (A.Jur. S. 14a).

The district court's logic is somewhat hard to follow. The district court indicates that having elections

every year under a plan which fails to maximize minority voting strength is worse, from the standpoint of minority voting strength, than having elections every other year under a plan with the same features. Following this curious logic, the less frequently elections are held, the greater the enhancement of minority voting power—obviously an implausible conclusion. While it is arguably true that two places could have been added to the City's governing body and filled by an election system which would tend to more nearly maximize voting strength of the minority voter, the ruling in *Beer* as to Plan II teaches that such is not the appropriate test. The true test is whether adding the two new numbered places *diminished* minority voting power, and there was no evidence to that effect whatsoever (A.Jur.S. 33a, 24a at n. 6).

The City of Lockhart provided testimony to the court below that enlargement of the City Council *enhanced*, rather than diminished, the voting power of minorities.[18] Information provided by Plaintiff's expert on

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[18] *See* Dissenting Opinion, A.Jur.S. 33a and testimony of Dr. Delbert A. Taebel, (J.A. 29a-30a; 33a-34a). This theoretical analysis is supported by the fact that, in the post-charter period, there has been a marked increase in Mexican-American political activity. In the six elections between 1973 and 1978 seven Mexican-Americans ran for office, whereas only two had run before in the entire history of the City. One Mexican-American was elected to the council after the charter was adopted, and he continues to serve as the first Mexican-American elected to the City's governing body. Voter participation by Mexican-Americans increased by over 50% in the 1973-1978 period, and the number of registered Mexican-American voters increased at a far greater rate than for the other segments of the population. These figures suggest that the Mexican-American perception of increased opportunities for successful minority candidates were well founded (Pl.Ex. 7; R. 119). *See, e.g.,*

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voting in Texas was not seriously controverted by any other witness with regard to impact of expansion of the governing body.[19] It is not the City's burden, however, to prove enhancement of minority voting power. All the City is required to prove under the Voting Rights Act is that the change did not *reduce* voting power for minorities. As Judge Robinson noted, this Court in *Beer* made it clear that the critical inquiry under §5 is "whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting" (A.Jur.S. 32a). Restated, Judge Robinson believed that the "decisive question" was "whether Lockhart's minorities are worse off [under the charter] than they were before" (A.Jur.S. 33a). And he quite correctly points out that the majority does not say why it believes minority voting power is reduced from the pre-charter level by increasing the number of positions on the City's governing body, even if the two new members are chosen by numbered places (A.Jur.S. 33a). It simply defies logic to assert that enlargement of the council, using the same basic election system, somehow abridged minority voting rights. Chief Judge Robinson put it succinctly:

> In pre-charter days, Lockhart's voters elected two members of its governing body in even-numbered years from candidates declar-

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testimony of B. Rangel, the successful Mexican-American candidate, as he perceived the situation in 1973: he felt a larger council "would increase [his] chances of being elected." (R. Depo. B. Rangel, p. 29, 72).

[19] *See, e.g.*, Testimony of Intervenor's expert witness Frederich A. Cervantes (J.A. 13a-15a, 60a) and Justice Department's expert witness Charles Cottrell (J.A. 46a).

> ing their aspirations for a specific seat. Under the charter, exactly the same thing will also occur in odd-numbered years. Lockhart's voters would go to the polls twice as frequently to ballot on council membership, but the voting strength of Lockhart's minorities, whether or not enhanced, would not be diminished one whit. Every year, as a councilmanic election in Lockhart approaches, minorities would occupy the same relative position they formerly did in every alternate year—perhaps no stronger, but certainly no weaker (A.Jur.S. 33a).

The only apparent rationale for refusing preclearance of the numbered places is that a better system could have been instituted. Proper analysis, however, involves a comparison of old and new systems. The district court majority opinion does not explain why the use of numbered places in *annual* elections as opposed to biennial elections diminishes minority voting power. Thus, the City of Lockhart urges that expanding the number of persons elected under such system could not have had discriminatory impact on minority voting rights.

II. *THE DISTRICT COURT IMPROPERLY HELD THAT ELECTION OF COUNCILMEN TO TWO NEWLY-CREATED POSTS IN OFF-YEAR ELECTIONS DILUTES MINORITY VOTING STRENGTH.*

The "staggered" term feature provided by the Lockhart home rule charter was the result of adding the two new places to the City's governing body. As noted above, the mayor and councilmen for places one and two, elected in 1972, continued to serve until the 1974

elections. The 1973 election was the first of the elections to be held in odd-numbered years to fill the new councilmanic positions, places three and four.

In reasoning that the staggered term feature created by these two new places had a discriminatory impact on minorities, the reasoning of the majority below again ran counter to *Beer* and *Perkins v. Matthews*. All members of the district court recognized—and the City does not dispute—that staggered terms may be a potentially discriminatory election device. The City would concede, as does Chief Judge Robinson (A.Jur.S. 35a), that if the prior system had required at-large elections every other year to fill four council positions, and the change was to fill two council positions every year, that a discriminatory change could have occurred. But that is not the case here, since Lockhart did not simply move from non-staggered elections to staggered terms. The staggered term feature was a byproduct of the enlarged council. Had the council not been expanded by the two positions, staggered terms would not have existed.[20]

Chief Judge Robinson noted that the staggered term feature could not be correctly analyzed without examining the expanded size of the Council. Increased size in no way diminished minority voting strength; it

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[20] The majority states that the staggered term feature combined with numbered posts, "affects twice as many elections for a larger number of positions" and thereby creates a "synergistic discriminatory effect" (A.Jur.S. 14a). The only possible explanation for this statement is that the majority compared the charter election system against some theoretical system which might have been devised to maximize minority voting power. The statement simply cannot withstand analysis if the comparison is made to the actual pre-charter election system. *See* analysis in section I-A, *supra*.

may have even *enhanced* voting strength.[21] He noted quite correctly that the majority absolutely fails to tell us *why* voting power is diminished when an additional election is used to fill newly-created council positions. Judge Robinson concluded that annual elections using numbered places in no way diminish minority voting power, as compared to a prior system of biennial elections for a smaller number of positions (A.Jur.S. 36a).

In a given political system, an election plan can be devised which greatly improves the political power of Mexican-Americans, or Blacks, or any number of other interest groups. All that is required by §5, however, is that the changes not bring about a *reduction* in the political effectiveness of a protected group. The annual election feature, while perhaps a "change" in the technical sense since staggered terms do result from the enlargement, has no adverse impact when viewed as accompanying an enlargement of the governing body.[22] With no diminution in minority voting power thus identifiable, the court should have concluded no adverse §5 "effect."

III. *THE DISTRICT COURT WENT BEYOND THE SCOPE OF PROPER PRECLEARANCE REVIEW INSOFAR AS IT REJECTED THE CITY'S ENTIRE "GOVERNANCE AND ELECTION PLAN" SINCE ONLY THE ELECTION FEATURES OF THE CHARTER WERE PROPERLY BEFORE IT.*

Before and during trial, the attorneys representing the Justice Department urged that if the changes in

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[21] *See* n. 18, *supra.*

[22] *See* Dissenting Opinion, A.Jur.S. 36a.

Lockhart's voting procedures were deemed to adversely affect minority voters, then the entire home rule charter system of government should fall.[23] Although the opinion below is not entirely clear on this point, the district court seems to have accepted the Attorney General's thesis, and the court seems to have attempted to deny preclearance not only to the voting aspects of the home rule charter, but also to the City's very home rule status arising from adoption of the charter.[24]

While the Justice Department has seemed to assert on occasion that the mere adoption of a home rule charter, and the resulting increased powers of municipal government, may constitute a "change" under the Voting Rights Act, such a position is inconsistent with the Justice Department's failure to object to the adoption of the charter itself, and the limitation of its objection to specific aspects of the charter.[25] If the

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[23] *See, e.g.*, Post Trial Brief of the United States, p. 18:

> The effect of [denial of pre-clearance] would be that the City must revert back to its status as a general law city utilizing the commission form of government.

See also n. 3, *supra*.

[24] This is indicated in the majority's refusal to approve the "governance and election plan" (A.Jur.S. 16a, ¶12, 14) and in their statement that Lockhart is now a "general law city" again (A.Jur.S. 2a).

[25] In the "Memorandum for the United States" in this cause, there is a suggestion that the case of *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 98 S.Ct. 965, 55 L.Ed. 2d 148 (1978), offers support for the proposition that a new system of government incorporating a pre-existing voting feature may trigger §5 review. While the City of Lockhart can understand the Justice Department's desire to maintain its potential authority to review (and refuse to preclear) a change in the mere form of government, even unaccompanied by a

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majority is indeed taking the position that refusal to preclear one objectionable aspect of a charter requires rejection of the entire charter, it has taken a unique and inappropriate step unnecessarily destructive of local government. This ruling went beyond even the intervenor's desire for relief.[26]

The majority simply offers no explanation of why the entire home rule charter must be invalidated based upon its finding of objectionable voting features. No case has ever gone so far in interpreting the meaning of "changes" in voting procedures under the Voting Rights Act. Even if the voting procedures were correctly denied preclearance, such should not provide justification for the majority's rejection of the entire charter and the home rule system of government it allows.

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change in voting practices, that right is questionable under the language of the Voting Rights Act, and receives little support from *Sheffield*. The central issue in that case was whether Sheffield, Alabama, was a "covered jurisdiction" under the Voting Rights Act. The court did not squarely face the issue of whether a revision in the City's form of government, with voting practices essentially unchanged, triggers §5 review. Thus the case offers no support for the action of the lower court in invalidating Lockhart's home rule status.

[26] See, for example, pre-trial correspondence from intervenor's counsel to the Justice Department, dated September 10, 1979:

> If the United States Attorney General is of the opinion that the City must return to the city commission form of government should a letter of objection issue, we would rather suffer the consequences of the current discriminatory election structure rather than permanently disenfranchise the minority community through a city commission form of government.

(Pl.Ex. 11; R. 119).

Moreover, following the court's reasoning, had *no* election feature been changed in the adoption of the charter, the charter should nonetheless have been denied preclearance because it "legitimatized" an election system which the court found objectionable under state law. (A.Jur.S. 13a). This logic cannot withstand analysis, for if there were no voting changes within the ambit of §5 ("different standard, practice, or procedure with respect to voting") there would be no necessity for submission of the charter for §5 preclearance. The Voting Rights Act is limited to review of voting practices. Use of the provisions of that Act to severely restrict the effectiveness of municipal government in Lockhart in unrelated areas by reducing the City to general law status is clearly beyond the power of the district court and beyond the purpose of Congress in enacting the Act.

The adoption of a home rule charter is the equivalent at the municipal level to the adoption of a constitution at the national level. The charter is deemed to spring from the people, *Xydias Amusement Co. v. Houston*, 185 S.W. 415, 418 (Tex.Civ.App.-Galveston 1916, writ ref'd); 2 E. McQuillin, Municipal Corporations §9.03 (3d Ed. 1979), and, unlike a general law city, a home rule city derives its powers directly from the people, not from some legislative grant of power. The people of Lockhart, including its minority voters, have enacted a home rule form of government which brings about changes far beyond the relatively minor election changes discussed above. If the majority opinion is to be sustained, and the charter discarded, all of this is lost.

The City of Lockhart therefore submits that, to the extent the district court purported to restore Lockhart to general law status in matters unrelated to voting

practices, it has exceeded its authority under the Voting Rights Act. That Act does not and should not reach so far into the affairs of municipal government.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court reverse the district court and decree that the adoption of the Home Rule Charter had no adverse impact on minority voting rights.

Respectfully submitted,

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Supplemental Appellant's Brief

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No. 81-802

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

City of Lockhart,
Appellant

v.

United States of America
and
Alfred Cano,
Appellees

On Appeal From the United States
District Court of the District of Columbia

APPELLANT'S SUPPLEMENTAL BRIEF

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IN THE SUPREME COURT OF

THE UNITED STATES

CITY OF LOCKHART,

Appellant

vs.

UNITED STATES OF AMERICA

and

ALFRED CANO,

Appellees

On Appeal From the United States District Court For The District of Columbia

APPELLANT'S SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 35.5, this supplemental brief with appendix is submitted to bring to this Court's attention certain events which have taken place since the filing of Appellant's brief in chief.

All briefs heretofore filed in this cause have noted that in 1979 the United States District Court for the Western

District of Texas entered an order enjoining elections in Lockhart until preclearance procedures were completed according to Section 5 of the Voting Rights Act.[1] The City has accordingly held no elections since entry of the temporary injunction on March 2, 1979.

On March 24, 1982, the Intervenor in this case (who was Plaintiff in the 1979 action) moved for an order imposing elections by single-member districts pending resolution of preclearance litigation in Washington. The City responded by requesting modification of the March 2, 1979 order to allow elections in the manner in which they had been held prior to adoption of the Home Rule Charter in 1973, pending preclearance. After briefs were submitted by the parties, the District Court on May 17, 1982, entered an order granting the City's request to return to the pre-Charter election system on an interim basis.[2]

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[1] Cano v. Chesser, No. A-79-CA-0032 (W.D. Tex., March 2, 1979).

[2] The full text of the Amended Temporary Restraining Order is attached as Appendix S-1 to this Supplemental Brief. Use of the pre-Charter system is allowed in para. B, p. S-7-8.

The District Court specifically revised its findings of fact with respect to retention of numbered places as a "change" under Section 5. Whereas the original order stated that the "adoption" of numbered places was one of the "major changes" of the Home Rule Charter, the amended order deletes this language altogether, and identifies only the enlarged council and staggered terms as changes.[3]

The significance of this ruling is clear: the District Court in Texas rejects Intervenor's contention that Lockhart's use of the pre-Charter election plan as a Home Rule City (as opposed to its use as a general law city), is a "change" under Section 5 of the Voting Rights Act. The City is therefore free, for the first time since 1979, to hold elections as contemplated by the Voting Rights Act - in the same manner as conducted prior to adoption of the Home Rule Charter.

---

[3] Appendix, p. S-4, para. 11.

Respectfully submitted,

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APPENDIX S-1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ALFRED W. CANO, et al,*
Plaintiff *
VS. * A-79-CA-032
W. E. CHESSER, et al, *
Defendants. *

AMENDED TEMPORARY RESTRAINING ORDER

This cause having been heard upon Plaintiff's Motion for A Temporary Restraining Order involving the Voting Rights Act, 42 U.S.C. Section 1973 et seq. and having previously entered a Temporary Restraining Order herein, the Court is of the opinion that this Amended Temporary Restraining Order should be entered, containing the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This is an enforcement action instituted pursuant to Section 5 of the Voting Rights Act of 1965, as amended in 1975, 42 U.S.C. Section 1973c.

2. Plaintiff is a resident of the City of Lockhart, Caldwell County, Texas. Plaintiff is a registered voter and is a United States citizen of Mexican descent.

3. Defendants W.E. Chesser, Jesse Kelley, Mike Scott, Bernardo F. Rangel, and Thomas Frizzell are members of the City of Lockhart, Caldwell County, City Council and are sued in their individual and official capacities.

4. Defendant Catherine Gideon is the duly elected and acting City Secretary of the City of Lockhart, Caldwell County, Texas and in this capacity is in charge of conducting municipal elections. The City Secretary is sued in her individual and official capacity.

5. Defendant City of Lockhart, Caldwell County, Texas is a political subdivision subject to the requirements of the Voting Rights Act of 1965, as amended.

6. On September 23, 1975, the Voting Rights Act of 1965 was extended and amended to cover the State of Texas. State and political subdivisions covered by the Act must comply with certain specified procedures. Among them is the requirement that all qualifications, prerequisites, standards, practices, procedures with respect

to voting different from those in effect on November 1, 1972, must be adjudged by either the United States Attorney General or the United States District Court for the District of Columbia not to have the purpose or effect of denying or abridging the right to vote on account of race, color or membership in a language minority group.

7. Prior to February 20, 1973, the City of Lockhart was governed by a City Commission form of government pursuant to Vernon's Ann. Civ. Statutes, Article 1154.

8. Prior to February 20, 1973, the City of Lockhart elected the mayor and two city commissioners on the first Tuesday in April every two years to the City Commission. The two City Commissioners were elected by place to the City Commission of the City of Lockhart. See Plaintiff Exhibit No. 1.

9. On February 20, 1973, the City of Lockhart conducted a Special Charter Election to determine whether the City of Lockhart would adopt the proposed Home Rule Charter as drafted by the Charter Commission.

10. On February 20, 1973, as a result of the Special Charter Election, the

proposition adopting the Home Rule Charter was passed by the City of Lockhart electorate. See Plaintiff Exhibit No. 2.

11. Among the major changes required by the adoption of the Home Rule Charter was to enlarge the City Council to four members, plus the Mayor and to adopt staggered terms for councilmanic elections.

12. On April 5, 1973, the City of Lockhart City Council met in a Special Call meeting to canvass the ballots of the City Election. Said elections involved the selection of councilmembers for places three (3) and four (4).

13. For every councilmanic election, since 1973, the City of Lockhart has held elections for membership on the City Council pursuant to a numbered place system.

14. Unless the City of Lockhart is enjoined, the City will continue to implement the changes incorporated in the Home Rule Charter in the upcoming elections and future councilmanic elections, thereby subjecting Plaintiff to irreparable injury.

15. The February 20, 1973 adoption of the Home Rule Charter by the City of Lockhart, Caldwell County, Texas has not

been precleared by the United States Attorney General or the United States District Court for the District of Columbia pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c.

Based on these findings of fact, this Court enters the following CONCLUSIONS OF LAW.

1. Jurisdiction is proper before this District Court. 42 U.S.C. Section 1973c. There is no necessity to convene a Three Judge Court since the contentions advanced by Defendants are without merit and insubstantial.

2. The Voting Rights Act of 1965, as amended in 1975 applies to the City of Lockhart, Caldwell County, Texas.

3. Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c requires the City of Lockhart, Caldwell County, Texas to preclear all changes in the law affecting voting enacted after November 1, 1972.

4. The adoption of the Home Rule Charter by the City of Lockhart, Caldwell County, Texas on February 20, 1973, constitutes a voter qualification prerequisite to vote, or standard, practice, or

procedure with respect to voting different from those in effect on November 1, 1972.

5. The February 20, 1973 adoption of the Home Rule Charter by the City of Lockhart, Caldwell County, Texas has not been precleared pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c and therefore is unenforceable. The Home Rule Charter cannot be implemented in any future municipal elections unless precleared.

6. There is a substantial probability that Plaintiff will prevail on the merits, since the City of Lockhart, Caldwell County, Texas is a covered jurisdiction under the Voting Rights Act and has enacted an election change which has not been precleared pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c.

7. Plaintiff will suffer immediate, irreparable injury by being required to vote pursuant to a change in law affecting voting which has not been precleared pursuant to Section 5 of the Voting Rights Act. The election process in the City of Lockhart, Caldwell County, Texas has already commenced with the calling of the election.

8. Any administrative inconvenience caused by the granting of this Temporary Restraining Order is outweighed by the important fundamental right to vote as protected by the Voting Rights Act.

9. The granting of this Temporary Restraining Order will not be adverse to the public interest.

10. Plaintiff has no adequate remedy at law and injunctive relief is both appropriate and necessary.

THEREFORE, this Court ORDERS:

A. That Defendants, their officers, agents, servants, employees, attorneys and those person in active concert or participation with Defendants are hereby restrained from holding elections pursuant to the Home Rule Charter unless and until the February 20, 1973 adoption of the City of Lockhart Home Rule Charter is precleared according to the provisions of Section 5 of the Voting Rights Act of 1965, as amended in 1975.

B. Until a final determination is made by the United States District Court for the District of Columbia and by the United States Supreme Court, approving the Home Rule Charter or until the pre-existing plan is held to be unconstitutional,

Defendants are allowed to conduct elections pursuant to the pre-existing electoral system.

C. That due to the significant public interest involved in this case, the giving of security by Plaintiffs under the terms of Rule 65 (c) Federal Rules of Civil Procedure, be and it hereby is dispensed with.

SIGNED and ENTERED this 17th day of May, 1982.

/s/ H. F. Garcia
H. F. GARCIA
UNITED STATES DISTRICT JUDGE

Appellee's Brief

1

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No. 81-802

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF LOCKHART, APPELLANT

v.

UNITED STATES OF AMERICA AND ALFRED CANO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the City's adoption in 1973 of a home rule charter governance and election plan, including an element also used in the City's pre-charter electoral scheme, constituted a change subject to review under Section 5 of the Voting Rights Act.

2. Whether the district court's holding that the adoption of that plan had a retrogressive effect on the voting rights of the City's Mexican-American residents was reached under a correct legal standard and was not clearly erroneous.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court's opinion (J.S. App. 2a-37a) is not yet reported.

JURISDICTION

The order of the three-judge court, convened pursuant to 42 U.S.C. 1973c, was entered July 30, 1981 (J.S. App. 38a). The City of Lockhart filed its notice of appeal on October 28, 1981 (J.S. App. 39a). This Court noted probable jurisdiction on March 1, 1982. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c.

STATEMENT

1. The City of Lockhart brought this suit in February 1980 under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, seeking a declaratory judgment that the adoption of its home rule charter in 1973 did not produce

electoral changes that had the purpose or effect of abridging the voting rights of Mexican-American citizens (J.S. App. 2a). Following a two-day trial before a three-judge panel of the United States District Court for the District of Columbia (J.S. App. 2a), in which submissions were "limited to evidence pertaining to the 'effect' of the adoption" of the charter (*ibid.*), the action was dismissed on the merits on the basis of the following factual findings and undisputed evidence.

a. Lockhart lies in Caldwell County, Texas, approximately 30 miles south of Austin (J.S. App. 3a). In 1970, Lockhart's population of 6,489 persons was 45% Anglo, 41% Mexican-American and 14% black (*ibid.*)

Under Texas law, municipalities must be "general law," "special charter" or "home rule" cities (J.S. App. 3a). From 1917 until 1973, Lockhart was a "general law" city, a classification under which it had power to undertake only tasks specifically authorized by Texas law. As a "general law" city, it was required by state law to have a mayor and two commissioners elected at-large every two years. Lockhart had no control over the size of its governing body or the method of selecting it (*id.* at 3a-4a). Although Texas law did not specifically authorize the use of numbered posts by a "general law" city, Lockhart elected its two commissioners to numbered posts (*id.* at 4a).[1]

If a general law city satisfies certain state law requirements, it may adopt a city charter and become a home rule city. In drafting a charter, a city is afforded broad leeway to adopt any form of government and election procedures

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[1] Under the numbered post system, candidates were required to designate which of the two commission seats they sought. The candidates drawing the most votes for each seat won the election (J.S. App. 4a).

that is not forbidden by state law. For example, a city may choose a council or commission form of government and may elect its members at-large, with or without numbered posts, or from single-member districts. It may also stagger the terms of its elected officials (J.S. App. 4a).

In 1972, the Lockhart City Commission appointed a 15-member committee to study the feasibility of converting Lockhart to "home rule" status. The committee, which was composed of nine Anglo, four Mexican-American, and two black members recommended the formation of a charter commission to draft a home rule charter. The study committee members were subsequently elected as the Charter Commission (J.S. App. 5a).

On February 20, 1973, the citizens of Lockhart adopted by referendum the home rule charter as drafted by the Commission. The charter provided for a government consisting of a mayor and four council members, all to be elected at-large. The charter mandated the election of council members to numbered posts. Their terms were to be staggered: the mayor and two designated council members were to be elected in even-numbered years and the remaining two council members in odd-numbered years. Elections under this charter were held every year from 1973 through 1978 (J.S. App. 5a).

Data from the elections held under the charter reveal a high correlation between the number of Spanish-surnamed voters who participate in Lockhart's elections and the number of votes that Spanish surnamed candidates receive, and thereby establish that racial bloc voting is practiced in Lockhart (J.S. App. 6a-7a). Prior to adoption of the home rule charter, no Mexican-American had been elected to a position in the Lockhart city government. In 1978, however, after expansion of the council

from two to four members, Bernard Rangel, a Mexican-American, won a seat on the city council (*id.* at 7a).[2]

b. In 1977, four Mexican-Americans had filed a lawsuit challenging the constitutionality of the City's method of electing council members under the charter. In the course of that trial, it was revealed that Lockhart had never sought clearance of its home rule charter pursuant to Section 5 of the Voting Rights Act (J.S. App. 5a-6a). See *Cano* v. *Kirksey*, No. 77-CA-133 (W.D. Tex. Apr. 5, 1978).[3]

A second action was filed in which the district court enjoined the City from holding elections until the 1973 electoral changes received Section 5 approval (J.S. App. 6a). *Cano* v. *Chessar*, No. A-79-CA-0032 (W.D. Tex. Mar. 2, 1979). Following this order, the City, on May 7, 1979, submitted the home rule charter to the Attorney General for Section 5 preclearance. On June 27, 1979, the Attorney General requested additional information, which was provided by the City in July. On September 14, 1979, the Assistant Attorney General, on behalf of the Attorney General, interposed an objection pursuant to Section 5 "insofar as [the home rule charter] incorporates an at-large method of election, with numbered posts and staggered terms" (J.S. App. 6a; Defendants' Exh. 12). Lockhart, thereupon, filed this action for declaratory relief (*ibid.*).

2. The three-judge district court panel (Robinson, C.J., dissenting) dismissed the City's suit on the merits.

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[2] In addition, since adoption of the charter, more Mexican-Americans have registered to vote (J.A. 66a), more have voted (*id.* at 77a), and more have filed as candidates for office (*id.* at 76a).

[3] As a result of the 1975 amendments to the Voting Rights Act, Pub. L. No. 94-73, Section 405, 89 Stat. 405, the State of Texas and the City of Lockhart must comply with the preclearance requirements of Section 5 for electoral changes made after November 1, 1972.

Noting that a plaintiff's burden in a Section 5 declaratory judgment action is to demonstrate that the electoral changes at issue have neither the purpose *nor* the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group (J.S. App. 14a-15a), the court held (*id.* at 16a) that the City had failed to carry its burden of demonstrating that the 1973 electoral changes would not have the effect of abridging the voting rights of Mexican-Americans in Lockhart and that therefore the request for a declaratory judgment had to be denied.[4]

The court focused on three electoral features of the "home rule governance and election plan" contained in the charter adopted by the City in 1973: the use of numbered posts for councilmanic elections; the decision to have four elected councilmembers (an increase of two over the number of commissioners who had carried out analogous functions in the pre-charter city government); and the use of staggered terms for the councilmembers (J.S. App. 5a, 7a-8a, 15a-16a). In thus focusing its inquiry, the court rejected the City's contention that, because Lockhart had used numbered posts prior to November 1, 1972, the effective date for its coverage by Section 5, the numbered post provision of the charter was not a change subject to Section 5 review (*id.* at 10a). The court reasoned, first, that the numbered posts for councilmember seats were features of a newly created election scheme that was part of the "entirely new form of city

[4] Because an inquiry into discriminatory purpose would be unnecessary if the City were unable to satisfy its burden under the "effect" standard, the district court confined its review in the first instance to whether the changes in question had an impermissible effect under Section 5 (J.S. App. 2a). Had the City sustained its "effect" burden, the second part of the bifurcated trial—proceedings with respect to discriminatory purpose—would have been held (*ibid.*).

government" that replaced the abolished commission form of government by virtue of the voters' adoption of the home rule charter (*id.* at 11a). Second, the court concluded that the use of numbered posts was impermissible under Texas law for a general law city (because the practice was not expressly authorized by state law) and that the use of such a feature by the City during its pre-charter years therefore "must be treated for Section 5 purposes as if it had never existed until it appeared legitimately" in the 1973 home rule charter (*id.* at 11a-13a). The validation of numbered posts in itself constituted a change, the court reasoned (*id.* at 13a).

On the merits, the court concluded that the electoral changes embodied in the home rule charter—specifically the use of numbered posts and staggered terms—produced a "synergistic discriminatory effect" (J.S. App. 14a) constituting an impermissible retrogression in the ability of Mexican-Americans to influence electoral results in Lockhart (*id.* at 16a). The court, therefore, denied the City's request for a declaratory judgment (*id.* at 17a). The court reached this conclusion as to numbered posts on the basis of its finding that where, as in Lockhart, elections are characterized by a pattern of racial bloc voting, the use of numbered posts in an at-large electoral system diminishes the opportunity of minority group members to elect candidates of their choice by concentrating their voting strength effectively (J.S. App. 7a-8a). In any single head-to-head contest, the majority racial group's candidate would necessarily win if bloc voting occurs; but if the field of candidates competing against each other is enlarged, and the majority vote is split among a number of candidates, a minority group, concentrating its strength through "single-shot or bullet voting" behind one or two candidates, can prevent the majority's candidates from winning all the available seats (*ibid.*). To the

extent that numbered posts create a series of separate contests with small fields of candidates, the "leverage" of single shot voting is reduced (*ibid.*). The court also concluded that "[t]he employment of staggered terms further diminishes this leverage" (*id.* at 8a).

Chief Judge Robinson, in dissent, found no impermissible retrogression resulting from Lockhart's adoption of the home rule charter. Initially, he held that the only electoral changes that were before the court were the addition of two numbered post council seats to the two that had previously existed and the provision requiring election to the two additional seats in odd-numbered years (J.S. App. 23a). He thus concluded that the charter simply retained two numbered posts from pre-charter days and that the continued use of those posts did not constitute a change triggering Section 5 review (*ibid.*). He regarded the prior legality or illegality of these numbered posts under state law as irrelevant, in light of *Perkins* v. *Matthews*, 400 U.S. 379 (1971), which held that the electoral procedure that is *in fact* in force, regardless of its legality, is the benchmark for determining whether there has been an impermissible voting change (J.S. App. 30a).

With regard to the two new numbered council seats, Chief Judge Robinson concluded that they did not produce retrogression, because Lockhart's voters would now simply have the same choice at the polls every year that, in pre-charter years, they exercised every other year: *i.e.*, the election of two council members to numbered posts (J.S. App. 33a).

Similarly, regarding staggered terms, Chief Judge Robinson concluded that the charter did not cause retrogression in minority voting strength, because each council election would involve the election of two candidates to numbered seats, just as before enactment of the charter

(J.S. App. 35a). He reasoned that increasing the frequency of elections, without any change in the elections themselves, did not diminish the voting strength of Mexican Americans (*id.* at 36a). Accordingly, he would have reopened the proceedings to consider evidence regarding discriminatory purpose (*id.* at 37a).

SUMMARY OF ARGUMENT

I.

The district court correctly concluded that the City's adoption in 1973 of a home rule charter containing a comprehensive governance and election plan was an electoral change triggering the review provision of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Section 5, in pertinent part, requires all jurisdictions to which Voting Rights Act coverage was extended in 1975 (a class that includes Lockhart) to submit to the Attorney General for clearance, prior to implementation, any "standard, practice, or procedure with respect to voting different from that in force or effect" on November 1, 1972. This Court has repeatedly stated that Congress intended to subject all changes, regardless of their magnitude, to Section 5 scrutiny. *Allen* v. *State Board of Elections*, 393 U.S. 544, 568 (1969); *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 122-123 (1978).

Lockhart's conversion from a "general law" city, governed by a mayor and two at-large commissioners elected to numbered posts, to a "home rule" city governed by a council-manager system, including an enlarged legislative body that wielded greatly expanded powers and that was selected in staggered elections with candidates running at large for numbered posts, qualifies as a change requiring Section 5 preclearance.

The court below properly rejected the City's contention that the numbered post feature of its new home rule

governance and election plan was not reviewable because the same feature had been included in the commission government plan previously followed by the City. In converting to home rule status, Lockhart was empowered to abandon the old election plan and to devise a new one comprising elements entirely of its own choosing. The fact that an element chosen for the new home rule plan is the same as one employed in the earlier plan should not serve to insulate the decisionmaking process from scrutiny for discriminatory purpose as to this aspect of the plan. By the same token, neither should it preclude the court from reviewing the new election plan in its entirety as to discriminatory effects. The scope of review engaged in by the court below was therefore entirely proper under Section 5.

II.

The district court, however, committed reversible error in finding that Lockhart's electoral changes had a retrogressive effect on Mexican-American voting strength and that the City therefore did not carry its burden of showing that the new election plan had no discriminatory effect. The court correctly acknowledged that, under *Beer* v. *United States*, 425 U.S. 130, 141 (1976), Section 5 merely insures that no voting change will be made that "would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" and does not guarantee that any new procedure used will maximize minorities' voting strength. But the court employed incorrect legal principles in determining the basis for comparison of the charter election plan with the earlier plan; and its retrogression finding was clearly erroneous in the face of record evidence respecting the City's actual experience under the charter election plan.

Numbered posts and staggered terms may, in some circumstances, operate in conjunction with racial bloc voting to produce a discriminatory impact on minority voting rights. But in this case the prior plan, against which the new plan was to be measured, had employed numbered posts; hence any disadvantage stemming from that feature had existed prior to the adoption of the charter and its inclusion in the new plan could not be considered retrogressive. The court below failed to reach this conclusion because it decided that the numbered post feature had been unauthorized for general law cities and therefore could not be regarded as part of the pre-charter plan. This reliance on what state law appeared to prescribe rather than on the procedure actually followed is at odds with this Court's admonition in *Perkins* v. *Matthews*, 400 U.S. 379, 394-395 (1971), that a court must look to the practices that were followed *in fact* by a particular municipality in order to determine what were its voting practices at a given time for purposes of determining Section 5 coverage.

Staggered terms—added apparently because of the enlargement of the municipal legislative body from a mayor and two commissioners to a mayor and four councilmembers—were not part of the earlier plan; but the court failed to provide a logical explanation why voting for two numbered posts every year, rather than every other year as before, should be deemed to diminish the opportunities of Mexican-Americans for effective political participation.

The court's retrogression finding, based on the interaction of numbered posts and staggered terms, should be vacated for the additional reason that it is clearly erroneous in view of the record evidence showing that the position of Mexican-Americans with respect to numbers of registered voters, the percentage of those actually

voting, and the number of candidates running for office actually improved after the home rule charter election plan was put into effect. In addition, it was only after the adoption of this plan that a Mexican-American candidate won an elective position in the city government.

Chief Judge Robinson, in dissent, thus correctly concluded that the City had carried its burden of showing that the home rule charter election plan would not have the effect of denying or abridging, on prohibited grounds, Mexican-Americans' right to vote, and that the court therefore should not have dismissed the complaint, but rather should have gone on to consider whether the election plan was in any respect the product of a discriminatory purpose.

ARGUMENT

I. THE CITY'S ADOPTION IN 1973 OF A HOME RULE CHARTER GOVERNANCE AND ELECTION PLAN, INCLUDING AN ELEMENT ALSO USED IN THE CITY'S PRE-CHARTER ELECTORAL SCHEME, CONSTITUTED A CHANGE SUBJECT TO REVIEW UNDER SECTION 5 OF THE VOTING RIGHTS ACT

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, requires the City of Lockhart to obtain preclearance from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia whenever it "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972."[5]

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[5] This requirement has applied to the City since the enactment of the 1975 amendments to the Voting Rights Act. See page 4, note 3, *supra*.

This language has been consistently read broadly as reaching "any state enactment which altered the election law of a covered State [or political subdivision] in even a minor way." *Allen* v. *State Board of Elections*, 393 U.S. 544, 566 (1969). After reviewing the legislative history of the Voting Rights Act, this Court concluded that Congress intended "that all changes, no matter how small, be subjected to § 5 scrutiny." *Id.* at 568. Accordingly, this Court has interpreted Section 5 as requiring preclearance of such changes as candidate qualification requirements (*id.* at 570; *Hadnott* v. *Amos*, 394 U.S. 358 (1969)); changes in the location of polling places (*Perkins* v. *Matthews*, 400 U.S. 379, 387-388 (1971)); annexations (*City of Richmond* v. *United States*, 422 U.S. 358 (1975); *City of Petersburg* v. *United States*, 410 U.S. 962 (1973)); changes in the number of electoral wards, the adoption of numbered posts, majority vote requirements and staggered terms (*City of Rome* v. *United States*, 446 U.S. 156 (1980)); and redistricting and reapportionment (*Georgia* v. *United States*, 411 U.S. 526 (1973)). In reenacting Section 5 in 1970 and 1975, Congress reaffirmed the validity of this Court's interpretation of congressional intent. See *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 38-39 (1978); *Georgia* v. *United States*, 411 U.S. at 533; S. Rep. No. 94-295, 94th Cong., 1st Sess. 15-16 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 8-9 (1975).

The regulations of the Attorney General pursuant to which the Department of Justice enforces Section 5[6] emphasize that "[a]ny change affecting voting, even though it appears to be minor or indirect, even though it

[6] This Court has recognized the central role of the Attorney General in enforcing Section 5 and has appropriately looked to his interpretation of Section 5 for guidance. *Dougherty County Board of Education* v. *White*, *supra*, 439 U.S. at 39 and cases cited therein.

ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirements." 28 C.F.R. 51.11. Of particular relevance to this case, the Attorney General's regulations specifically refer to "the use of a designated post or place system" (28 C.F.R. 51.12(f)) and "staggering the terms of office" (28 C.F.R. 51.12(i)) as examples of changes subject to Section 5 preclearance.

The City, in fact, does not dispute the proposition that numbered posts and staggered terms are voting practices of the kind covered by Section 5. Rather it asserts (Br. 6-14) that its adoption of numbered posts in the election and governance plan contained in its home rule charter is not within the purview of Section 5 because it is merely a feature retained from the pre-charter system of government that existed before the period of Section 5 coverage. The City thus contends that only the enlargement of the municipal governing body by two places and the addition of staggered terms could be considered by the district court under Section 5, and that the court therefore erred in examining the entire election and governance plan contained in Lockhart's new charter—a plan providing for a council-manager form of government, an enlarged governing body with greatly expanded powers, and staggered elections with candidates running for numbered posts. See Art. 3 of Lockhart, Texas, Home Rule Charter (Defendant's Exh. 7).[7]

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[7] The City's additional contention (Br. 19-23) that the district court exceeded its powers by reviewing and striking down the City's entire home rule charter is puzzling. In its complaint dated Feb. 6, 1980 (¶ 7), the City asserted that the only electoral changes effected by its adoption of the charter were the enlargement of the city council and the addition of off-year elections for the newly-created positions; but

This conception of the boundaries of the court's Section 5 inquiry is based on a mistaken characterization of the process by which the election and governance plan of the home rule charter came into being and on an unwarranted extension of *Beer* v. *United States*, 425 U.S. 130 (1976), and *Perkins* v. *Matthews*, 400 U.S. 379 (1971), to circumstances not involved in those cases.

As explained in the Statement (pages 2-3, *supra*), in making the transition from a general law city to a home rule city, Lockhart converted from a municipality

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the City nonetheless asked, in its prayer for relief, that the court issue an across-the-board judgment declaring that "the Home Rule Charter adopted by the City of Lockhart on February 20, 1973 did not constitute a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972" or, alternatively, that the charter did not have the purpose or effect of denying or abridging the right to vote on prohibited grounds. Having asked for a declaratory judgment with respect to the entire charter, the City is hardly in a position to complain about the court's reviewing the entire charter under Section 5.

In any event, the court apparently accepted the City's invitation only to the extent that it reviewed the "governance and election plan" contained in the charter (J.S. App. 5a). The court found that the City had not met its effects burden with respect to the plan because of the inclusion of numbered posts and staggered elections. (Obviously there are sections of the charter—*e.g.*, a section requiring public hearings on the budget (Defendant's Exh. 7, § 9.07, at 20) and one providing when taxes should be paid (Defendant's Exh. 7, § 9.24, at 24)—that do not in any way bear on voting practices; and there is, accordingly, no reason for such provisions to be scrutinized under Section 5 of the Voting Rights Act).

It is true that, as the City notes (Br. 20 n.24), the court at one point described Lockhart as "a general law city" (J.S. App. 3a); but this is a slender reed on which to rest an argument that the court invalidated the entire home rule charter, particularly in view of the fact that the court merely issued an order denying the City's request for a declaratory judgment and dismissing the complaint.

possessing only the authority specified in Texas law for general law cities to a municipality possessing all the powers it chose to confer upon itself by charter to the extent not prohibited by Texas law. See *Forwood* v. *City of Taylor*, 214 S.W.2d 282 (Tex. 1948); *City of West Lake Hills* v. *Westwood Legal Defense Fund*, 598 S.W.2d 681, 683 (Tex. Civ. App. 1980); Tex. Rev. Civ. Stat. Ann. Art, 1161 (Vernon 1963). Most significantly, Lockhart was no longer subject to the state-law-imposed commission form of government (see Tex. Rev. Civ. Stat. Ann. Art. 1158 (Vernon Cum. Supp. 1981)); it was free to establish an entirely new form of government, writing on a blank slate. Each element of the election and governance plan in the new charter was, therefore, the product of deliberate choices made by the City's Charter Commission in the months preceding the charter's adoption (J.S. App. 5a).

Those choices included the decision to incorporate in the charter broad new powers, such as the power of annexation, to be exercised through the new city council (Lockhart, Texas, Home Rule Charter §§ 1.03, 3.07 (Defendant's Exh. 7 at 2, 5-6)).[8] These were powers formerly exercised by the state legislature, which could be influenced by Lockhart voters only through the state

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[8] A great number of choices must be made in the creation of a home rule charter. As the Handbook for Mayors & Councilmembers in Home Rule Cities explains (J.A. 64a-65a):

> In contrast to counties, general law cities, and special districts, whose organization is fixed by state law, the governmental structure of a home rule city is left entirely to the discretion of local voters. Subject to compliance with the federal Voting Rights Act, the citizens of a home rule city are free to decide their form of municipal government (mayor-council, council-manager, etc.); choose between a large or small governing body; provide for the election of the city council at large, by single-member districts, or by a combination of the two; fix council-members' terms of office at two, three or four years; and establish overlapping terms of office. Moreover, they can decide

legislative electoral system. Such a redistribution of powers among officials elected by different constituencies under different electoral schemes has an obvious potential for purposefully discriminatory abuse and, in any event, alters election law in more than "a minor way" (*Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 566) and thus requires preclearance under Section 5 before implementation. See *Horry County* v. *United States*, 449 F. Supp. 990, 995-996 (D.D.C. 1978) (three-judge court). Moreover, because the City's elected officials wielded these new charter powers, features of the plan by which they were elected acquired added importance for Lockhart voters.[9]

In devising that election plan, as well as other features of the charter, the Charter Commission closely followed the charter of a nearby town, similar in size to Lockhart

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whether the mayor is to be elected directly by the voters, selected from among members of the governing body, or chosen by some other method.

The citizens of a home rule city also have total discretion over the city's administrative structure. Subject only to local preferences, the charter can establish a simple administrative framework or a complex one; prescribe the specific duties of the various city departments or delegate this item to the city council; provide for the appointment or election of major administrative officials; and so on. And finally, the charter can provide for the creation of any boards or commissions local voters decide are needed as part of the machinery of the city government.

[9] The Attorney General has considered such fundamental changes in the form and nature of city governments to fall under Section 5 and has objected when such changes have incorporated discriminatory features (J.A. 74a-75a). See *Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 183-185 (1975).

The Attorney General did not object to the redistribution of powers effected by Lockhart's home rule charter, and no claim was made in this litigation that the redistribution had any discriminatory effect

(J.S. App. 5a). That model did not include numbered posts for city council elections, but the Commission nonetheless decided to include numbered posts in its plan (*ibid.*). This feature is widely recognized as possessing a strong discriminatory potential. See *City of Rome* v. *United States*, *supra*, 446 U.S. at 184 n.19; S. Rep. No. 94-925, 94th Cong., 1st Sess. 27-28 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 19-20 (1975); United States Commission on Civil Rights, *The Voting Rights Act: Ten Years After* 206-208 (1975). The fact that numbered posts were also a part of the election scheme used in the now-abandoned commission form of government, surely should not serve to insulate the Charter Commission's decisionmaking process from scrutiny for discriminatory purpose as to this aspect of the plan it devised. By the same token, neither should it preclude the court from reviewing the new election plan in its entirety as to discriminatory effect. Cf. *City of Petersburg* v. *United States*, 354 F. Supp. 1021, 1029 (D.D.C. 1972), summarily aff'd, 410 U.S. 962 (1973) (annexation considered "in the context of [a pre-existing] at-large voting system"). See also *City of Richmond* v. *United States*, *supra*, 422 U.S. at 370.

The district court's decision to scrutinize all the newly selected provisions of the charter that constituted "a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" is, moreover, in accord with the express intent of Congress. In the Senate Report on the 1975 Voting Rights Act

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on the Mexican-American electorate. The question whether a plan has the effect of abridging the right to vote on prohibited grounds is, however, distinct from the question whether it is subject to review under Section 5 for discriminatory purpose or effect. Our submission here is merely that this major redistribution of powers was subject to Section 5 review.

amendments, the Committee observed (S. Rep. No. 94-295, 94th Cong., 1st Sess. 19 (1975)): "In some Section 5 cases, a change in the voting practice or procedure may also retain some features of the previous system, and all aspects of such a change are in reach of Section 5." [10] That is precisely the situation here. The City has changed its governance and election scheme and has deliberately "retain[ed]" within that scheme the use of numbered posts. All aspects of the "change," including the retained feature, are therefore within the purview of Section 5.

Beer v. *United States*, *supra*, and *Perkins* v. *Matthews*, *supra*, do not support the City's argument to the contrary. *Beer* was an action for a declaratory judgment that a New Orleans plan reapportioning five city council districts mandated by the city charter did not violate Section 5. The charter, which had been adopted before the effective date of Section 5, also required the election of two council members at-large. In holding that the two at-large seats were not subject to Section 5 review, the Court stated (425 U.S. at 138-139):

> The ordinance that adopted [the reapportionment plan] made no reference to the at-large councilmanic seats. Indeed, since those seats had been established in 1954 by the city charter, an ordinance could not

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[10] The Committee cited the district court decision in *Beer* v. *United States*, 374 F. Supp. 357 (D.D.C. 1974) (three-judge court), rev'd, 425 U.S. 130 (1976), as an example of such a situation; but the subsequent reversal of *Beer* does not affect the significance of this statement with respect to congressional intent regarding features "retain[ed]" by a changed voting practice. As we explain below, the relevant ground for reversal in *Beer* was that the pre-existing feature in question (at-large city council seats) was *not* incorporated in the new voting plan. Hence, the Committee merely cited as an example a case which, as this Court later made clear, did not involve facts coming within the language of the Committee statement respecting elements retained within a changed voting procedure.

> have altered them; any change in the charter would have required approval by the city's voters. The at-large seats have existed without change since 1954 were not subject to review in this proceeding under § 5.

Perkins merely held that in determining the nature of the voting practices during the period immediately preceding Section 5 coverage, one should look to practices actually employed rather than to what state law had dictated those practices should be. Neither *Perkins* nor *Beer* involved the creation, within the period of Section 5 coverage, of a comprehensive election plan that superseded the plan employed when the Voting Rights Act became effective and that expressly adopted certain features of the superseded plan.

The logic of the City's argument, finally, would require the conclusion that, even if the Lockhart Charter Commission deliberately set out to devise a home rule election plan that would reduce the opportunities of Mexican-American voters to participate effectively in the electoral process, Section 5 of the Voting Rights Act would prove no obstacle to the plan's implementation so long as the Commission took care to select its discriminatory features from those included in the election plan that was in effect on November 1, 1972. The district court below, as well as the court in *Cano* v. *Chessar*, No. A-79-CA-0032 (W.D. Tex. Mar. 2, 1979), correctly rejected the argument that would dictate such a result. [11] The 1973 home

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[11] Congress extended the coverage of Section 5 to include Texas, in part, because it found (S. Rep. No. 94-295, *supra*, at 27; H.R. Rep. No. 94-196, *supra*, at 19) that at-large election schemes including such features as "numbered place[s]" were used widely in Texas and had the effect of denying political access to potential Mexican American and black voters. Accordingly, Congress could not have intended that a Texas city, constructing an election plan from the

rule charter plan establishing a council-manager form of government and providing for the election of four council members to numbered posts in staggered elections is thus reviewable in its entirety under Section 5 of the Voting Rights Act. [12]

II. THE DISTRICT COURT'S HOLDING THAT THE CITY'S ADOPTION OF A HOME RULE GOVERNANCE AND ELECTION PLAN HAD A RETROGRESSIVE EFFECT ON THE VOTING RIGHTS OF MEXICAN-AMERICANS WAS REACHED UNDER AN INCORRECT LEGAL STANDARD AND IS BASED ON CLEARLY ERRONEOUS FACTUAL FINDINGS

In *Beer* v. *United States*, *supra*, 425 U.S. at 141, this Court emphasized that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise" (emphasis added). Therefore, the duty of a court reviewing a city's electoral changes under Section 5 is not to determine whether the city has maximized the voting strength of its minority citizens, but rather to inquire whether the city has shown that it has not measurably diminished the ability of minorities to participate in the political process. *City of Richmond* v. *United States*, *supra*, 422 U.S. at 370-372.

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ground up at a time after Section 5 coverage had become effective, would be free to re-employ those same troublesome features and escape Section 5 review in doing so.

[12] Because, for all these reasons, the election plan incorporating numbered posts must be considered a change, there is no need to address the district court's additional conclusion (J.S. App. 13a) that the numbered post feature constituted a change on the ground that it was validated by the charter and thus, for the first time, authorized under Texas law.

In the present case the district court concluded (J.S. App. 16a) that the home rule governance and election plan is retrogressive within the meaning of *Beer*, but it reached that conclusion by choosing the wrong standard against which to assess the present election plan and by making factual findings based on speculations concerning the possible effect of certain features that conflict with undisputed evidence of the City's actual experience under the plan. For these reasons, the court's conclusion that the City failed to carry its burden under Section 5 respecting the effect of the plan's adoption cannot stand. See *Pullman-Standard* v. *Swint*, No. 80-1190 (Apr. 27, 1982), slip op. 13-14.

To be sure, the use of numbered posts and staggered terms may in many instances operate to diminish the ability of minorities to elect candidates of their choice. *City of Rome* v. *United States*, *supra*, 446 U.S. at 184 n.19, 185 n.21; United States Commission on Civil Rights, *The Voting Rights Act: Ten Years After* 206-208 (1975). Numbered posts virtually eliminate the possibility of single-shot voting, because only the candidate garnering the highest number of votes for each post can triumph (see pages 6-7, *supra*). Similarly, the use of staggered terms of office limits the number of positions at stake in each election and requires that minority candidates finish higher in the field to win election. Staggered terms may also decrease voter turnout, since voter interest may suffer if fewer places are at stake. Thus, operating in tandem, numbered posts and staggered terms have a clear potential for imposing a serious disadvantage on minority voters. As Chief Judge Robinson correctly pointed out in his dissent (J.S. App. 27a-34a), however, under the proper retrogression analysis mandated by *Beer*, the court below was required to compare the home rule charter election against the plan that the

City had previously employed—one that also contained numbered posts.

The majority's failure to make the correct comparison was based on its conclusion that it should compare the charter plan with the plan of elections that, in the court's view, had previously been mandated by state law—not with the plan according to which the City had actually conducted its elections. The majority concluded that, under Texas law, the City's use of numbered posts during its time as a general law city was illegal. Chief Judge Robinson correctly disagreed with the majority's approach, concluding (J.S. App. 28a-30a) that *Perkins* v. *Matthews*, *supra*, required the court to look to the practices and procedures actually followed by Lockhart prior to its adoption of the home rule charter.

The pertinent section of *Perkins* v. *Matthews* concerned the question whether there had been a change within the meaning of Section 5 rather than the question whether a new electoral plan was retrogressive, but its analysis is clearly relevant to the retrogression question here. The City of Canton, Mississippi, had elected its aldermen by wards prior to and immediately after the Voting Rights Act became applicable to Mississippi and its political subdivisions. A state law that was enacted in 1962, two years before the effective date of the Act, had required, however, that municipal alderman be elected at large. The precise question was whether Canton's action in 1969, conforming its practices to the requirements of the 1962 state law by converting from ward elections to at-large elections, was an electoral change. The Court concluded that the 1969 action was such a change; it reasoned (400 U.S. at 394) that "the voting procedure 'in force or effect on November 1, 1964,' " the date as of which Mississippi voting practices became subject to the Voting Rights Act, was "the procedure that would have

been followed if the election had been held on that date." It was clear from the record that Canton had been electing aldermen from wards during that period, notwithstanding the provisions of state law, and because this was the procedure that was then "*in fact* 'in force or effect' " (*id.* at 395; emphasis in original), the 1969 shift to at-large elections was held to constitute a change. [13]

In the present case, the evidence showed that numbered posts had been used in the commission system of government for the two Lockhart commissioners' seats in every Lockhart election since 1917 (J.S. App. 4a). The City maintained that state law had not required it to forego the use of numbered posts during the time it operated as a general law city; the legality of the practice had never been challenged; and no opinion from the office of the Texas Attorney General had ever suggested that the use of numbered posts by a general law city was unlawful. Nor does it appear that any state court has ever addressed the question. In view of this Court's teaching in *Perkins* that the Section 5 focus must be on actual voting practices—not practices as described in state statutes—the court below clearly erred in comparing the

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[13] Our reliance on *Perkins* v. *Matthews* for determining the proper comparison for retrogression purposes is not inconsistent with our submission (pages 18-19, *supra*) that *Perkins* is irrelevant to the question whether all features of Lockhart's home rule charter election plan should be evaluated under Section 5, including those that had been employed under the plan Lockhart had followed when it was a general law city. The section of the *Perkins* opinion in question merely concerns whether a municipality's real practices for Section 5 purposes are those it follows or those that, under state law, it should follow; *Perkins* does not concern itself with the consequences of conscious adoption, as part of an overall election plan, of a feature that had been used in the election plan employed on the date that the Voting Rights Act became effective.

home rule charter election plan with a prior voting plan that is nothing more than a hypothetical construct based on the court's view of the requirements of state law, offered without the benefit of state court guidance.

If the proper comparison is made, no retrogression finding may be based on the use of numbered posts. Because numbered posts had been used before, minority groups had not previously enjoyed the leverage of single-shot voting, so their inability to make use of that practice under the charter plan is not retrogressive.

The question, then, is whether the expansion of the legislative body from two commissioners to four councilmen and the introduction of staggered terms constitute grounds for finding that the City failed to show that the home rule charter election plan was not retrogressive. Here again, the dissenting opinion provides the correct analysis. The majority stated (J.S. App. 14a) that there was retrogression because "the discriminatory impact of the numbered posts * * * affects twice as many elections for a larger number of positions"; but this assertion does not explain why minority voters' strength should thereby be reduced. As the dissenting judge observed (*id.* at 33a): "Every year, as a councilmanic election in Lockhart approaches, minorities would occupy the same relative position they formerly did in every alternate year—perhaps no stronger, but certainly no weaker."

The court's conclusion respecting staggered terms—that they work, in combination with numbered posts, to produce a "synergistic discriminatory effect" (J.S. App. 14a)—has similar infirmities. As Chief Judge Robinson observed (*id.* at 35a), the use of staggered terms means only that the voters are voting every year for candidates vying for two numbered posts, rather than every other year. It is not apparent why the experience of minority candidates in each separate election should be considered

altered merely because the process will repeat itself during the next year rather than two years later. Even if electing only two councilmembers at a time tends to "highlight individual contests"—a factor stressed by the court below (*id.* at 8a), the fact remains that similar highlighting occurred in each biennial election held in the pre-charter period.

It is true that some witnesses suggested that holding elections every year might tend to reduce voter turnout and that reduced turnout would, in turn, have a negative effect on minority participation (J.A. 16a, 57a-59a). But there was no reason to rely on speculations in this case because the City had actually held elections under the home rule charter election plan. The evidence available from those elections showed that minority turnout had not been reduced. Indeed, to the contrary, Mexican-American voters have voted in greater numbers since the adoption of the charter. In 1970, for example, 64 out of a total of 478 voters (13.39%) were Spanish-surnamed voters, while in 1978—the last year for which data were available—some 660 Spanish-surnamed persons voted, accounting for 33.12% of the total number of voters participating (J.A. 77a).

Furthermore, Mexican-Americans have run for office in increasing numbers since the adoption of the charter. Between 1938 and 1972, only two Mexican-American candidates filed in the City's elections, but in the five-year period immediately after the change to home rule, seven Mexican-Americans declared their candidacies (J.A. 76a). In addition, since 1973, Mexican-American voter registration has increased from 599 in 1970 to 974 in 1977 (*id.* at 66a). Finally, in 1978, for the first time, Lockhart's voters elected a Mexican-American, Bernard Rangel, to the city council (J.S. App. 7a). A finding of retrogression on this record—*i.e.* a finding with respect

to "the reality of changed practices as they affect [minority] voters" (*Georgia* v. *United States*, *supra*, 411 U.S. at 531)—is clearly erroneous.

In sum, the proper inquiry under Section 5 is whether the ability of the Mexican-American voters of Lockhart "to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting." *Beer* v. *United States*, *supra*, 425 U.S. at 141, quoting H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 60 (1975). As we have shown, the court below did not make the proper inquiry because it failed to use the correct bases for comparison, and its retrogression finding also conflicts with the record evidence of the City's actual experience under the home rule charter election plan. The court's finding that the City's home rule charter election plan is retrogressive was therefore made under an incorrect legal standard and, in addition, was clearly erroneous in light of the evidence. For these reasons, the finding cannot stand. *Pullman-Standard* v. *Swint*, *supra*, slip op. 13-14.

CONCLUSION

The judgment of the district court should be vacated and the case remanded to the district court for consideration of whether the home rule charter election and governance plan was adopted with a purpose to discriminate.

Respectfully submitted.

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Appellee's Brief

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF LOCKHART,

Appellant,

v.

UNITED STATES AND ALFRED CANO,

Appellees.

On Appeal From The United States District Court For the District Of Columbia

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QUESTIONS PRESENTED

1. Whether the City of Lockhart's 1973 adoption of a Home Rule Charter which comprehensively changed its form of government, incorporating some previously-used features in its election system, was a change subject to review under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c.

2. Whether the District Court correctly held that the numbered place and staggered terms features of Lockhart's election system incorporated in the Home Rule Charter were discriminatory in their effect on minority voters. */

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*/ The third question framed by Appellant City of Lockhart is not properly before this Court. See p. 53, n.43 infra.

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No. 81-802

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

CITY OF LOCKHART,

Appellant,

v.

UNITED STATES AND ALFRED CANO,

Appellees.

On Appeal From The United States
District Court
For The District of Columbia

BRIEF FOR APPELLEE CANO

STATEMENT OF THE CASE

The Statement of the United States in its Brief (pp. 1-8) is generally complete and accurate.

The Statement in the Brief of Appellant City of Lockhart overlooks several pertinent points:

(a) The City failed to submit its Home Rule Charter to § 5 review for over three and one-half years after submission became required by Section 5, 42 U.S.C. §1973c. The City's submission came only after Appellee Cano and others obtained an injunction against elections under the Charter since it had not been precleared. 1/

(b) In the 1979 litigation before the District Court for the Western District of Texas, Appellant contended, as it does here, that its 1973 Home Rule Charter did not constitute a voting change triggering Section 5 preclearance requirements. The District Court ruled against Lockhart on that issue. 2/ Rather than appeal the District Court's injunctive order, Appellant chose to attack it in the instant collateral proceedings after the Attorney General objected to the contested features of the Charter.

1/ Cano v. Chesser, No. A-79-CA-0032 (W.D. Tex., March 2, 1979).

2/ Cano v. Chesser, supra n. 1, Conclusion of Law #4, p. 3.

(c) As noted by Appellant, the United States has retreated from its position, consistently maintained in the court below, [3/] that both the numbered place [4/] and staggered terms provisions of the Charter had discriminatory effect on Mexican American voters in Lockhart. The United States does not, however, maintain that those features are wholly without discriminatory effect; rather it argues here that those effects are not retrogressive under the standard of Beer v. United States, 425 U.S. 130 (1976).

3/ See Appellee Cano's Supplemental Memorandum, filed February 12, 1982, in response to Appellants' Jurisdictional Statement.

4/ The terms "numbered places" and "numbered posts" are used interchangeably in this brief.

SUMMARY OF ARGUMENT

I. A. Congress designed Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, as a comprehensive, effective remedy for all discriminatory voting or election changes in covered jurisdictions. This Court has repeatedly confirmed Section 5's broad sweep and remedial purpose, beginning with Allen v. State Board of Elections, 393 U.S. 544 (1969). Numbered place systems and staggered terms are among the most widespread discriminatory devices for which Congress intended Section 5 to provide a remedy.

B. In adopting its Home Rule Charter in 1973, Lockhart fundamentally changed its governmental status and structure. It exercised the power to devise its own election and governance systems, replacing those which it was previously compelled to use as a general law city. Lockhart's decision to continue its use of numbered places was therefore a political choice which triggers Section 5 preclearance for two reasons. First, when a city changes its system of governance, each element of

its new system, including those adapted from earlier use, is a covered change. S. Rep. No. 94-295, 94th Cong., 1st Sess. (1975), p. 19; Georgia v. United States, 411 U.S. 526, 531 (1973). Second, the legal and practical status of Lockhart's numbered place system changed with home rule. The adoption of the Charter legitimated Lockhart's use of numbered places and insulated it from legal challenge, and the impact of the use of numbered places for the two "old" seats was altered by the addition of two "new" numbered place seats. To hold that Lockhart's adoption of numbered places in its 1973 Charter was not a Section 5 change, based either on an extension of Beer v. United States, 425 U.S. 130 (1976) far beyond the facts of that case, or on an inflexible reading of language in Perkins v. Matthews, 400 U.S. 379 (1971), would frustrate the strong remedial policies underlying Section 5.

II. A. The effect of Lockhart's use of numbered posts and staggered terms on

Mexican American citizens is most realistically measured by observing the overall impact of the City's election system. Since 1973 all Mexican American candidates have been defeated, except for one who capitalized on unusual fragmentation of the polarized Anglo vote against him. The combined effect of numbered posts and staggered terms is to "spotlight" minority candidates to their detriment. Neither the minor expansion of the council nor increasing Mexican American political activity cancels out these discriminatory effects.

B. The record also provides ample support for the district court's finding that both the numbered place and staggered terms features, viewed separately, have discriminatory effects. Each contributes to "targetting" of minority candidates by a hostile Anglo electorate, and the increased number of election races reduces minority voter turnout.

C. Under Section 5, Lockhart bears the burden of proving that its election system does not have discriminatory effects. To meet that

burden, Lockhart proposes a simplistic and narrowly focused before/after test that would obscure "the reality of changed practices", Georgia v. United States, supra. Recent legislative history shows this approach to be out of step with Congress' intention for robust application of Section 5. This Court should avoid the pitfalls of undercutting section 5's vigor by affirming the district court's judgment since its findings of fact, that Lockhart's election system had the requisite discriminatory effect, are not clearly erroneous. Pullman Standard v. Swint, 72 L. Ed. 2d 66 (1982).

ARGUMENT

I

LOCKHART'S ADOPTION OF THE NUMBERED PLACE ELECTION FEATURE IN ITS HOME RULE CHARTER WAS A CHANGE COVERED BY SECTION 5 OF THE VOTING RIGHTS ACT.

A. In Enacting And Extending Section 5, Congress Devised A Broad Remedy Designed To Assure Federal Review Of All Voting Practices, Including Those Featured By Lockhart's System, Adopted By Covered Jurisdictions.

Using broad terms, Congress enacted Section 5 of the Voting Rights Act to provide for federal review of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" which changed prior law in a covered jurisdiction. 42 U.S.C. §1973c. [5/] Congress designed Section 5 to assure a comprehensive, centralized system for review of all voting or election changes by covered jurisdictions, comprising "the front line of defense against vot-

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5/ Congress enacted Section 5 as part of the original Voting Rights Act in 1965, Pub.L. 89 - 110, 79 Stat. 437, and in 1970 renewed the Section for five years longer, Pub.L. 91 - 285, 84 Stat. 314. In 1975, Congress further extended the life of Section 5 and also extended its geographical scope to cover the State of Texas and its subdivisions, including the City of Lockhart, Pub.L. 94 - 73, 89 Stat. 402. See Briscoe v. Bell, 432 U.S. 404 (1977). At the time of the 1975 extension, Congress extensively considered the specific practices that Section 5 was intended to remedy. See pp. 12-17, infra. Section 5 was further extended and its purposes further expounded during the passage of the 1982 Voting Rights Act Amendments, Pub.L. 97 - 205 (June 29, 1982). See pp. 17-19, n. infra.

ing discrimination," S. Rep. No. 94-295, 94th Cong., 1st Sess. (1975), at 18. Congress specifically provided Section 5 as a preferred remedial alternative to protracted, costly litigation on a case-by-case basis. Id. at 11 - 12. 6/

This Court early ruled that Section 5 must be given "the broadest possible scope" so that it would reach "any state enactment which altered the election law of a covered state in even a minor way," Allen v. State Board of Elections, 393 U.S. 544, 566, 567 (1969). The Court has reiterated that principle in an unbroken line of later decisions from Perkins v. Matthews, 400 U.S. 379, 387

6/ As this Court has observed, Congress recognized the impracticality of litigation as a means of resolving the problems addressed by Section 5. South Carolina v. Katzenbach, 383 U.S. 301, 314, 328 (1966); United States v. Sheffield Board of Commissioners, 435 U.S. 110, 118 (1978). Yet, such unending litigation is precisely what Appellant prescribes for resolution of the controversy between Lockhart and its Mexican American citizens. See Brief for Appellant at 3 n.11.

(1971) to McDaniel v. Sanchez, 452 U.S. 130, 149 (1981). [7] In extending section 5, Congress in 1975 endorsed this broad interpretation of the Section's sweep. S. Rep. No. 94 - 295, supra, at 16; H.R. Rep. No. 94-196, 94th Cong. 1st Sess. (1975) at 9. See Dougherty County Board of Education v. White, supra, 439 U.S. at 38-39. Indeed, no other interpretation of this Section, which is "[t]he heart of the Act," [8] would be consistent with Congress' remedial intention to legislate in sweeping and effective terms to eliminate a great national evil. [9] Narrow technical interpretations

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7/ See also, Georgia v. United States, 411 U.S. 526, 533 (1973); United States v. Sheffield Board of Commissioners, supra, 435 U.S. at 122-23; Dougherty County Board of Education v. White, 439 U.S. 32, 37 - 39 (1978).

8/ South Carolina v. Katzenbach, supra, 383 U.S. at 315.

9/ South Carolina v. Katzenbach, supra; Georgia v. United States, supra.

are particularly inappropriate for legislation of this type. Piedmont & Northern R. Co. v. Interstate Commerce Commission, 286 U.S. 299, 311-12 (1932); Abbott Laboratories v. Portland Retail Druggists, 425 U.S. 1, 12 (1976). [10]

The Attorney General, who is charged with enforcement of Section 5, has always taken the broadest possible view of its coverage. Current Section 5 regulations embody that interpretation:

> Any change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights,...must meet the section 5 preclearance requirement.

28 C.F.R. §51.11. Congress has been well aware of the Attorney General's view, [11]

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[10] This principle was applied to interpretation of the Voting Rights Act in Briscoe v. Bell, supra, 410 U.S. at 410 and United States v. Sheffield Board of Commissioners, supra, 435 U.S. at 124-25.

[11] See, for example, Testimony of the Assistant Attorney General for Civil Rights, J. Stanley Pottinger, House Committee on the Judiciary, 94th Cong., 1st Sess. Extension of the Voting Rights Act, Hearings On H.R. 939 et al. (1975) at 166, 169, 183-185.

and has approved it. In United States v. Sheffield Board of Commissioners, supra, in deciding a related issue as to Section 5's scope, this Court noted that "the Attorney General's longstanding construction of Section 5 was reported to Congress by Justice Department officials in connection with the 1975 extension of the Act," 435 U.S. at 132. The Court deferred to that "contemporaneous administrative construction of the Act" as "persuasive evidence of the original understanding, especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress," id. at 131; accord, Dougherty County Board of Education v. White, supra, 439 U.S. at 39.

The legislative history of Section 5 makes it equally clear that one of Congress' major purposes was to make Section 5 an effective tool for elimination of exactly those practices challenged in this case: numbered posts and staggered terms in at-large elections characterized by racially polarized voting.

The reports of the Congressional Committees that prepared the bills that became the 1975 Voting Rights Act amendments [12] strongly emphasize the Committees' deep concern over the discriminatory use of numbered posts and staggered terms, and their intention to eliminate such discrimination through Section 5. Both Committees specified that Section 5 should apply to Texas in large part because

> [t]he at-large structure, with accompanying variations of the majority run-off, numbered place system, is used extensively among the 40 largest cities in Texas.... These structures effectively deny Mexican American and Black voters in Texas political access....When numbered posts are combined with a majority vote requirement, the chance for a minority candidate becomes practically impossible unless minorities are in a voting majority.

12/ The legislative history of the 1975 amendment is crucial because in that year Congress last changed the scope of Section 5. See United States v. Sheffield Board of Commissioners, supra, 435 U.S. at 133, 135 n.25.

S. Rep. No. 94-295, supra, at 794 and n. 17; H.R. Rep. No. 94-196, supra, at 19 and n. 21.

Both Committees documented the discriminatory use of at-large numbered place and staggered term systems by political jurisdictions in Texas. S. Rep. No. 94-295, supra, at 27; H.R. Rep. No. 94-196, supra, at 10, 18-19. To illustrate the need for Section 5, both Committee reports cite to a Texas district court decision [13/] which held unconstitutional a discriminatory change, embodied in a City Charter amendment, from an at-large commission system to a numbered place system. S. Rep. No. 94-295, supra; H.R. Rep. No. 94-196, supra, at 4-5, 19.

The concerns expressed in the 1975 House and Senate Committee reports reflect a disturbing record of discrimination made in those Committees' hearings. Numerous witnesses provided the Committees with abundant evidence of the discriminatory use of numbered posts

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13/ Weaver v. Muckleroy, Civ. No. 5524 (E.D. Tex. 1975).

and staggered terms. Indeed, after outright gerrymandering and the basic at-large system itself, no device was more frequently castigated in both the House [14/] and the Senate [15/]

14/ The following witnesses and evidence appear in the House Committee record, reprinted in House Committee on the Judiciary, 94th Cong., 1st Sess., supra n. 11:

Numbered posts identified as discriminatory:

Testimony of Arthur S. Flemming, Chairman, United States Commission on Civil Rights (February 25, 1975), pp. 26, 27, 28 (the latter page concerns Mexican Americans in Texas); Testimony of George Korbel (concerning Texas) (March 13, 1975), pp. 402, 422-23; Testimony of Armand Derfner (March 17, 1975), pp. 629, 646; United States Commission on Civil Rights Staff Memorandum, p. 954; United States Commission on Civil Rights, The Voting Rights Act-Ten Years After, pp. 1190-91, 1233, 1242-1244, 1281, 1307, 1326; David H. Hunter, Joint Center for Political Studies, Federal Review of Voting Changes, p. 1511.

Staggered terms identified as discriminatory:

Testimony of Arthur S. Flemming, Chairman, United States Commission on Civil Rights (February 25, 1975), p. 26;

Testimony of Rep. Charles B. Rangel (February 26, 1975), p. 95; Testimony of Armand Derfner (March 17, 1975) pp. 629, 645-46; United States Commission on Civil Rights, The Voting Rights Act-Ten Years After, pp. 1190-91, 1233, 1242, 1281, 1305, 1306; David H. Hunter, Joint Center for Political Studies, supra, p. 1512.

15/ The following witnesses and evidence appear in the Senate Committee record reprinted in Senate Committee on the Judiciary, 94th Cong., 1st Sess., Extension of the Voting Rights Act, Hearings on S. 407 et al (1975).

Numbered posts identified as discriminatory:

Testimony of Arthur S. Flemming, Chairman, United States Commission on Civil Rights (April 8, 1975), p. 95; Testimony of Dr. Charles L. Cottrell, concerning Texas, (April 10, 1975), pp. 462, 510; Roy E. Young, Institute for Public Affairs, The Place System In Texas Elections (Austin 1965), pp. 986, 988-89; Washington Research Project, "The Shameful Blight" (1972), pp. 1032, 1035.

Staggered terms identified as discriminatory:

Testimony of Arthur S. Flemming, Chairman, United States Commission on Civil Rights (April 8, 1975), p. 95; Testimony of Charles Morgan, Jr. (April, 1975), p. 841.

than numbered posts and staggered terms. The record underlying the 1975 Committee reports therefore buttresses the conclusion that Congress intended Section 5 to be applied broadly to prohibit discriminatory use of the election practices challenged in this case.

The legislative history of the 1982 extension of Section 5 shows that discriminatory uses of numbered place and staggered terms systems remain intended objects of the Section 5 remedy. Both House 16/ and Senate 17/ Committee reports again noted the pernicious effects of these structural barriers to minority voting rights.

16/ The House Judiciary Committee identified both numbered posts and staggered terms as among the "practices and procedures which individually or in combination result in inhibiting or diluting minority political participation or voting strength," H.R. Report No. 97-227, 97th Cong., 1st. Sess. (1981), at 18.

17/ The Senate Judiciary Committee identified numbered posts as one of "the types of impediments that still face minority voters in the covered jurisdictions," which justify further extension of Section 5. S. Rep. No. 97-417, 97th Cong., 2nd Sess. (1982), at 10.

And, as in 1975, the Committees acted on overwhelming evidence of the invidious effects of the numbered place and staggered terms features. 18/

18/ The evidence from the 1982 Senate Committee Hearings has not yet been reprinted. But the House Committee hearings, House Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, 97th Cong., 1st Sess., Hearings on Extension of the Voting Rights Act, H.R. 3112 (1982), are replete with evidence of how those features continue to discriminate. The House Committee had before it information from the Department of Justice showing that the Attorney General had objected to voting changes involving numbered place systems on 83 occasions (29 in Texas), and to changes involving staggered terms on 34 occasions. Letter of James P. Turner, Acting Assistant Attorney General, id., pp.2245-2277. Other witnesses and evidence that showed how these features continue to discriminate include the following:

Numbered posts identified as discriminatory:

Testimony of Benjamin L. Hooks, Executive Director, NAACP (May 6, 1981), p. 60; testimony of James E. Clyburn, South Carolina Human Affairs Commissioner (May 19, 1981), p. 238; testimony of Dr. Charles Cottrell (May 27, 1981), p. 447; testimony of Frank Parker (May 28, 1981), p. 533; testimony of Eddie N. Williams, President, Joint

As this Court recently noted in construing another sweeping civil rights statute (Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq.), such legislation

> must therefore be read against the background of the legislative history of [the Voting Rights Act] and the historical context from which the Act arose.

United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979). Likewise, as the Court here considers whether Lockhart's adoption of a Home Rule Charter incorporating numbered places was a "change" triggering Section 5, the

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Center for Political Studies (June 17, 1981), pp. 1834, 1842; testimony of Geraldine Thompson, Executive Director, Voter Education Project (June 17, 1981), p. 1944.

Staggered terms identified as discriminatory:

Testimony of Benjamin L. Hooks, supra, testimony of Arthur S. Flemming, Chairman, United States Commission on Civil Rights (June 16, 1981), p. 1768; testimony of Eddie N. Williams, supra, p. 1842; testimony of Geraldine Thompson, supra.

Court should recognize that Congress intended Section 5 as a comprehensive and effective antidote for exactly the kind of practices used by Lockhart.

B. The Adoption of Numbered Posts As An Election Feature Of The 1973 Home Rule Charter Constituted A Change Subject To Section 5 Preclearance Requirements.

The adoption of Lockhart's present election system was part of the enactment of the 1973 Home Rule Charter, which fundamentally altered the City's form of government. Under the Texas law, the status and powers of "general law" cities differ in fundamental ways from those of "home rule" cities. Forwood v. City of Taylor, 214 S.W.2d 282, 285 Tex. (1948); J.S.A.3a. [19/] As a Texas general law city prior to 1973, Lockhart exercised only limited powers in ways specified by State law; upon adoption of the Home Rule Charter, state law only

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19/ See also, City of Nassau Bay v. City of Webster, 600 S.W.2d 905, 910 (Tex. Civ. App. 1980); City of Dallas v. Crippen, 171 F.2d 526, 528 (5th Cir. 1948).

defined the outer limits of Lockhart's "inherent powers". Forwood v. City of Taylor, supra, 214 S.W.2d at 286; J.A. 64a, 68a.

Before adopting its Home Rule Charter, Lockhart was bound by state law to a commission form of government specifying a mayor and two commissioners, each elected to a two year term. Tex. Rev. Stat. Ann. Art. 1158 (1981). While state law apparently contemplates that these three officials would be elected at-large by the voters of the entire city, it does not prescribe or authorize the use of numbered posts. Because a general law city's "organization is fixed by state law" (J.A. 64a; see id. 17a), the court below found Lockhart's use of numbered places before 1973 "contrary to state law" and therefore "void" (J.S. App. 4a, 11a-13a). Under the home rule laws, Tex. Rev. Stat. Ann. Art. 1165 et. seq. (1963), a city may by adopting a charter assume "the full power of local self-government," including

> [t]he creation of a commission, aldermanic or other form of government; the creation of

> offices, the manner and mode of selecting officers and prescribing their qualifications, duties, compensation and tenure of office.

Tex. Rev. Stat. Ann. Art. 1175 (1963).

The creation of a four member City Council, with staggered two year terms and numbered place designations for councilmanic positions, exemplifies an affirmative local political decision which in Texas is not within the power of general law cities, but is one of many options available to home rule cities:

> The local governmental structure of a home rule city is left entirely to the discretion of local voters. Subject to compliance with the federal Voting Rights Act, the citizens of a home rule city are free to decide their form of municipal government (mayor-council, council-manager, etc.); choose between a large or small governing body; provide for the election of the city council at-large, by single-member districts, or by a combination of the two; fix councilmembers' terms of office at two, three, or four years; and establish overlapping terms of office. Moreover, they can decide whether the mayor is to be elected directly by the voters, selected from among members of the governing body, or chosen by some other method.

J.A. 65a (from "Handbook for Mayors and Councilmembers in Home Rule Cities," published by Texas Municipal League).

Apart from choosing their form of government and election systems, home rule cities may also exercise a wide range of important powers denied to general law cities. Among these are creation of municipal administrative structures, including boards, commissions, and departments; annexation of adjacent territory without the consent of its inhabitants; and use of initiative and recall procedures (J.A. 65a, 17a-19a). The adoption of Lockhart's Home Rule Charter entailed, therefore, a momentous change in its overall municipal status. See J.A. 49a [20/]

Texas law prescribes the procedures by which a general law city can adopt a

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20/ Dr. Charles L. Cottrell, an expert witness for the United States and a political scientist who has long studied Texas local government, testified that "a change to a home rule city would be viewed by a political scientist as a fundamental change in governmental form and the appendages and powers accruing thereto." (J.A. 49a)

home rule charter. It requires the adoption of an ordinance for voter approval of the initial step of selecting a charter commission, Tex. Rev. Stat. Ann. Art. 1165 (1963), the election of a commission consisting of fifteen or more members, id. Art. 1166, an election to approve or reject the charter proposed by the commission, id. Art. 1167, and adoption of the charter by majority vote, id. Art. 1169. During 1972 and 1973, Lockhart followed the prescribed procedure in adopting its Home Rule Charter. J.S. App. 4a, J.A. 28a-29a. In so doing, its City Commission, by ordinance, its Charter Commission, by proposal, and its voters, by election, chose to adopt a councilmanic structure with a mayor and four council members, an at-large election system with numbered place and staggered terms features, and two year terms. All these features represented choices from among a wide range of possibilities, see A.65a, quoted above. The referendum adopting the Home Rule Charter passed on February 20, 1973, J.S. App. 5a, after the effective date for changes subject

to Section 5 review, id. 9a-10a, 42 U.S.C. §1973c.

Appellant concedes that the staggered terms feature of its Charter is a change under Section 5, as is the addition of two new council seats with numbered places. However, Appellant denies that adoption of the two numbered council places corresponding to prior commissioner posts constitutes any "change". We submit that all aspects of the fundamental change in Lockhart's governmental structure are subject to Section 5 preclearance for two basic reasons. First, as the United States correctly argues, 21/ by adoption of the Home Rule Charter Lockhart changed its election laws and practices, subjecting the entire home rule election scheme, including use of four numbered posts, to review. Second, the affirmative choice to utilize the two numbered places as part of the new system changed their status and constituted a change in election laws or practice.

21/ Brief for the United States at 11-20.

1. This Court has never directly ruled on whether a covered jurisdiction's adoption of an entirely new form of government subjects each election feature of that new governmental structure to review under Section 5. However, several of its major Section 5 decisions suggest a positive answer to that question. In United States v. Sheffield Board of Commissioners, supra, the court ruled that a change of government from a city commission to a mayor-council system was a change triggering Section 5 review. 22/ Also instructive is Georgia v. United States, supra, 411 U.S. at 531, where the court rejected the argument that discriminatory features of a reapportionment plan were exempt from Section 5 review because the same features were used in the previous apportionment:

> Despite the fact that multi-member districts, numbered posts, and a majority runoff requirement were features of Georgia election law prior to November 1, 1964, the changes that followed from the 1972

22/ The new council system provided for at-large elections with numbered places, 435 U.S. at 115.

> reapportionment are plainly sufficient to invoke Section 5 if that Section of the Act reaches the substance of those changes. Section 5 is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters. 23/

Congress has consistently taken a broad view of Section 5's coverage, as discussed above (see pp. 8-12, supra). The 1975 Senate Committee Report reflects that approach to the particular question presented here:

> In some Section 5 cases, a change in the voting practice or procedure may also retain some features of the previous system, and all aspects of such a change are within the reach of section 5.

Senate Report No. 94-295, supra, at 19.

In arguing that the Court's decision in Beer v. United States, 425 U.S.

23/ The Court left open the question, somewhat analogous to the one presented here, of whether enactment of a reapportionment plan that left a particular district wholly unaffected would require Section 5 review of the district. 411 U.S. at 535 n.7.

130 (1976), outweighs these authorities, [24/] Appellant glosses over the facts and holding of Beer. The two at-large New Orleans City Council seats which Beer declared beyond the reach of Section 5 had existed unchanged since 1954. 425 U.S. at 139. The 1971 reapportionment scrutinized in Beer did not reauthorize, incorporate, or even mention the two seats, 425 U.S. at 138. The reapportionment law implemented a plan for the Council's single-member district seats only, 425 U.S. at 135. As this Court noted, the reapportionment ordinance could not even purport to change the two at-large seats, which would have required a city charter amendment, id. at 139. Thus, Beer is inapposite to this case, where by enacting Lockhart's 1973 Home Rule Charter its Commission and electorate specifically adopted and approved the use of two numbered posts similar to

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[24/] Brief for Appellant at 10-11.

the City's prior practice. 25/

The remedial policy underlying Section 5 requires recognition of change in the form of a covered jurisdiction's government as an event triggering Section 5 review of each election feature of the new scheme. Each time a jurisdiction makes political choices with respect to its election system, those choices are to be reviewed to ferret out practices tainted by discriminatory purpose or effect. This is equally true even if the choice is to retain a pre-existing discriminatory election practice. To hold otherwise would invite covered jurisdictions that wish

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25/ This Court's summary reversal of the Beer district court's ruling on this point does not undermine the force of the Senate Committee Report, set out in text at p. 27, supra, which cited that ruling. This Court ruled only that the District Court in Beer had erred in finding a change. This Court's Beer decision eliminates one illustration of what the Senate Committee intended Section 5 to cover, but does not affect the clarity or validity of that intention.

to perpetuate minority exclusion [26] to preserve intact devices responsible for diluting minority political strength, rather than ameliorating or eliminating such devices. Political jurisdictions may need or desire to change their form of government for a number of reasons, including reasons divorced from racial considerations. It is not too much to ask that when covered jurisdictions do so, they submit all aspects of their election systems to a searching scrutiny to detect discriminatory practices. [27]

2. However familiar they may have appeared to the City's voters, the two numbered places carried forward into Lockhart's Home Rule Charter election

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[26] This is a regrettably typical pattern, given the propensity of incumbents to utilize reapportionments and other election changes to enhance their job security.

[27] The existence in this case of such a change in the form of government, including an active choice among political alternatives, makes Perkins v. Matthews, 400 U.S. 397 (1971) inapposite to this argument. Cf. Brief for the United States, at 19, 23 n. 13.

scheme were not, from a legal perspective, identical to the place system previously used without authorization in the general law system. Since the earlier use of numbered posts was ultra vires, that usage was void before 1973. The legitimization of the numbered post system in 1973 constituted a significant change in legal status. Prior to the Home Rule Charter, Lockhart's minority citizens could have challenged the numbered-place system on state law grounds, and would presumably have prevailed. After passage of the Charter, those citizens - the intended beneficiaries of Section 5 - lost that opportunity. Section 5 was designed precisely to assure federal scrutiny of changes which result in a lessened opportunity for minority citizens to protect themselves from dilution of their voting strength. McDaniel v. Sanchez, supra, 652 U.S. at 149.

The application of a numbered post feature to the two new seats added by the Home Rule Charter - posts 3 and 4 - was by any standard a change covered by Section 5. The creation of new legislative positions by definition changes

election practices with regard to those seats. Moreover, the addition of two new seats significantly altered the political importance of the other two seats. Appellee Cano submits that the expansion of the council to four members constituted an election law change affecting all four numbered posts, requiring Section 5 preclearance for the electoral system applicable to all four posts.

Appellant's defense to these arguments consists of recitals of language from Perkins v. Matthews, supra. [28/] The question in Perkins was whether the City of Canton, Mississippi could escape preclearance of its use of a notoriously discriminatory election practice which Congress had meant Section 5 to control -- at-large elections -- by capitalizing on its failure to implement a state law requiring at-large elections

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28/ Brief for Appellant at 11-13.

prior to the trigger date for Section 5 review. 29/ This Court refused to let Canton flout the purpose of the Voting Rights Act and evade Section 5 coverage by this technical argument. The district court in this case was similarly moved, in part, by a reluctance to allow Lockhart to frustrate the purpose of the preclearance requirement. (J.S.A. pp. 13a- 14a) Here, the wooden application of Perkins would have the same result of frustrating an often and clearly repeat ed Congressional determination to subject post-1972 election laws using numbered places to Section 5 scrutiny. Here as in Perkins, this Court should refuse to apply Section 5 in a way that "would 'bring about an end completely at variance with the purpose of the statute'," United Steelworkers of America v. Weber, supra, 443 U.S. at 202, quoting United States v. Public Utilities Commission, 345 U.S. 295, 315

29/ Canton argued that since it was required by state law to utilize at-large elections prior to the trigger date (although it didn't do so), its later adoption of at-large elections did not constitute a change. 400 U.S. at 394.

(1953). The Court can avoid this result by recognizing that the change from unauthorized use of numbered posts to their inclusion in a home rule governance system was a change under Section 5. We would suggest an alternative phrasing of the Perkins test: the election practice under review should be compared to the practice actually in effect prior to the trigger date, and to the practice to which it would revert in the case of a section 5 objection. If either one differs from the present practice, then a significant change - either an actual change or a change in legal status - would have occurred. In this case, the Attorney General's objection had the effect of causing Lockhart to revert to at-large elections without numbered places, since the Home Rule Charter election provisions were rendered void by the objection and since state law does not provide for use of numbered posts in the absence of valid home rule authorization. Thus, a Section 5 change occurred when the Charter carried forward, into a new legal status, the use

of numbered places for the two "old" seats.

The district court correctly concluded that the use of numbered posts for the two "old" as well as the two "new" council positions created by the 1973 Home Rule Charter required Section 5 preclearance. It then properly proceeded to assess whether the numbered post feature, as well as the use of staggered terms, had a discriminatory effect on Mexican American voters. This Court must therefore also review that determination on discriminatory effect.

II

LOCKHART FAILED TO DEMONSTRATE THAT THE ELECTION LAW CHANGES INCORPORATED IN ITS CHARTER DID NOT HAVE THE EFFECT OF DILUTING THE VOTING STRENGTH OF MEXICAN AMERICANS.

A. The Aggregate Effect of The Election System Adopted In The Charter Is To Dilute The Voting Strength of Mexican Americans.

Mexican American voters and candidates in Lockhart do not experience an abstraction known as an election "feature", such as numbered posts or staggered terms, in campaigns for the

City Council. They encounter an election system whose real impact incorporates the effects of both of these features, as well as the other characteristics of Lockhart elections (polarized voting, two year terms, etc.). Analysis of the effects of the changes brought about by the City Charter should therefore address the election system as a whole, and its overall results, or, in this Court's words, "the reality of changed practices as they affect [minority] voters." Georgia v. United States, supra, 411 U.S. at 531.

The beginning point of such an analysis lies in election returns. Those results show that it is virtually impossible for minority candidates to gain election to the Lockhart City Council. In the six elections from adoption of the 1973 Charter to the time of trial, 30/ for 13 Council positions, only one minority candidate has been elected. (J.A. 62a) Five other minority

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30/ There have been no further elections since the March, 1979 injunction issued in Cano v. Chesser, supra n. 1.

candidates have been defeated. (id.) [31] The one successful Mexican American candidate, Bernard Rangel, won Place 1 in 1978 only because the polarized vote against him was divided among four serious Anglo opponents who together received nearly twice as many votes as Rangel. (J.A. 62a, 55a) Extraordinary fragmentation of the Anglo vote is essential to a Mexican American victory, as shown by other races in the same election. Strong Chicano candidates ran for both Mayor and Council Place 2; both lost, even though each had three Anglo opponents whose divisive effect on the Anglo votewas only slightly less severe than that of Rangel's four opponents. (J.A. 62a; J.S. App. 7a) Absent the extreme circumstances present in the 1978 Place 1 campaign, a minority candidate has virtually no chance to win in Lockhart.

The combination of numbered posts and staggered term elections produces

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[31] Another minority candidate for Mayor, who ran in 1978, also lost. (J.A. 62a)

"spotlighting" or "targetting" of minority candidates. By singling out minority candidates for head-to-head campaigns against particular Anglo candidates (often incumbents, see J.A. 62a), the Charter's election system diminishes the chance for minority candidates to overcome the hurdle of polarized voting. (J.A. 55a) Elections utilizing the numbered place and staggered terms features preclude a minority candidate from winning by placing lower than first (or even second), yet high enough for election to one of several seats filled at a consolidated election. (J.S. App. 8a; cf. J.A. 62a) They also preclude minority voters from maximizing their chance to elect a candidate of their choice through "single-shot" voting. [32/] (J.S. App. 8a; J.A. 38a)

32/ Single-shot voting occurs when electors, eligible to cast several votes in a single election for several positions or places, cast only one vote for their favored candidate, thereby avoiding dilution of that vote's effect by offsetting votes for less favored candidates. See, e.g., City of Rome v. United States, 446 U.S. 156, 184 n. 19 (1980).

The greater number and frequency of elections allows more effective targetting of minority candidates, whose chances to prevail despite the extreme degree of polarized voting present in Lockhart [33/] would be enhanced by single elections for a complete slate of council positions. See part B, pp. 43-47, infra.

It is misleading to argue, as Appellant does, that enhanced minority political access is demonstrated by the election of a single Mexican American

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33/ The record reflects an extraordinary correspondence between the number of Mexican Americans voting in each election and the number of votes received by Mexican American candidates. (J.S. App. 7a) In 1973, 417 Mexican Americans voted; the Mexican American candidates received 401 and 445 votes. In 1977, 233 Mexican Americans cast ballots; the Chicano candidate received 251 votes. And in 1978, when 660 Mexican Americans voted, the three Mexican candidates received 602, 642, and 655 votes. (J.A. 62a) (The only partial exception to this pattern came in 1974, when plaintiff-intervenor Cano attracted 320 votes, although only 197 Mexican Americans voted, id.) Expert witness Dr. Frederick Cervantes noted the high degree of correlation between these two sets of figures. (J.A. 57a)

candidate, in unique circumstances, and the increasing number of unsuccessful candidates (Brief for Appellant at 15 n. 18). 34/ Admittedly, we cannot show that electoral results since 1973 are worse, from a minority standpoint, than they were during the 1938-1972 period (cf. J.A. 76a). Indeed, Hispanic visibility in politics has increased throughout Texas and the nation, as it has in Lockhart. Registration of Hispanic voters increased by two-thirds in the 1976-1980 period, and the number of Hispanic elected officials in Texas increased 30% in the same period. S. Rep. No. 97-417, supra, at 7. But the increasing amount of (unsuccessful) political activity by Lockhart's Mexican American citizens since 1973 undoubtedly reflects a wide range of demographic and political circumstances such as lowering of the voting age, improvement in education and literacy among Mexican Americans, availability of bilingual election

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34/ The government makes similar arguments (Brief for the United States at 25).

materials, prohibition of barriers to minority voting, rising aspirations of the minority population, increasingly aggressive political organizing and voter registration in minority communities (see testimony of Bernard Rangel, J.A. 52a), and the effect of increasing visibility and numbers of Mexican American elected officials in Texas. 35/ All changes in political activity by Mexican Americans since 1973 cannot fairly be attributed to Lockhart's election system, yet Section 5 looks only to the effects of that system.

Likewise, the court below properly rejected Lockhart's argument that increasing the Council's size from three to five enhanced minority political strength. (J.S. App. 8a) Appellant relies for this argument on the testimony of its expert witness, Dr. Taebel, but Dr. Taebel's conclusions are inapposite. His study described the effects of increasing council sizes from small (defined as 1 to 6 members) to

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35/ See, United States Commission on Civil Rights, Unfulfilled Goals: The Voting Rights Act (1981) at 36 - 37; H.R. Rep. No. 97 - 227, supra, at 7.

medium (7 to 9 members) or large (10 or more members) (J.A. 59a, R. 97, R. Pl. Ex. 10). [36] since both before and after 1973, Lockhart's council was "small", there was no meaningful change in size by the terms of the study (R. 98). [37] Moreover, Dr. Taebel's study was a nationwide one, not focused on Texas (R. 70, 92), which by Dr. Taebel's own admission did not apply to situations where a Hispanic minority is concentrated in certain portions of the City (as in Lockhart) (R. 94-95).

36/ References in the form "R. ___" are to portions of the trial transcript or record not reprinted in the joint appendix.

37/ Dr. Charles Cottrell, the Government's expert witness, testified that an increase from three to only five members would not enhance minority election prospects, although significantly greater increases might. (J.A. 46a) Dr. Frederick Cervantes refuted Appellant's attempt to apply Dr. Taebel's conclusion to the small expansion of the Lockhart City Council. (J.A. 59a, 61a) The court below accepted Dr. Cervantes' conclusion. (J.S. App. 8a)

B. Viewed Separately, Both Numbered Places and Staggered Terms Diminish The Voting Strength of Mexican American Voters.

The district court found as a fact that Lockhart's use of both numbered places and staggered terms, separately as well as in combination, had discriminatory effect on Mexican American voters' chances of electing candidates of their choice. (J.S. App. 81, 16a) The record amply supports its finding as to both features of Lockhart's election scheme.

1. Appellant and the Government both concede the tendency of numbered places to exacerbate discrimination where polarized voting occurs. (See Brief for Appellant at 18, Brief for United States at 21.) Congress' awareness of that tendency underlies its deep suspicion of the device (see pp. 12-19, supra). But both parties deny that the evidence supports the district court's finding that the potential for discrimination was realized in Lockhart.

Numbered posts have facilitated anti-minority spotlighting or targetting

in Lockhart, as candidate Bernard Rangel testified on the basis of personal experience (J.A. 23a-24a). [38/] Dr. Charles Cottrell, the government's expert, gave a lengthy explanation of the adverse consequences of numbered places in Texas (J.A. 36a-39a) and confirmed Rangel's observations. (J.A. 54a-55a) Appellant's own witness, Dr. Taebel, conceded that numbered posts "give you an opportunity to vote against somebody" and foster spotlighting of candidates. (J.A. 31a-32a) The term "targetting" quite literally describes the subjective reaction of Lockhart's voters to strong Chicano candidacies. [39/]

[38/] As he put it, "the political system is still going to throw you the best [against a minority candidate]," id.

[39/] Overall voter turnout in Lockhart elections has been consistently highest when strong Mexican American candidates challenged the Anglo monopoly of political control, see J.A. 62a. By far the largest turnout in Lockhart's history occurred in 1978, when three Chicanos ran strong campaigns; the second largest turnout was in 1973, the only other election with more than one Mexican American candidate. (id., J.A. 81a-83a)

But the term is also metaphorically misleading in connection with "single shot" voting, which is nullified - not permitted - by "targetting". See p. 38 supra.

Appellant questions how the creation of two new or additional numbered posts, and the continuation of two existing posts, can erode the minority's political position. (Brief for Appellant at 18 - 19) As shown above, the legal status of Places 1 and 2, which existed before 1973, changed in a way that diminshed the minority's opportunity to challenge and invalidate them, see pp. 30-31, supra. Places 3 and 4 also added new discriminatory obstacles to the electoral equality of minorities. For this separate analysis, the creation of two new Council positions must be isolated from their designation as numbered posts rather than undifferentiated at-large seats, since Lockhart's Charter could have incorporated any of a wide variety of election features, see p. 22, supra. Therefore, that designation can be viewed as a distinct political choice which imposed new obstacles in the path of the minority voting community. Furthermore, the existence of two new

numbered posts exacerbates the discriminatory impact of the numbering of Places 1 and 2. The new posts give Anglo aspirants a larger number of separate occasions to win election without running against each other and dividing the dominant Anglo vote so deeply that a Mexican American might win. And the existence of five separate races enhances targetting to an even greater extent than it would exist in campaigns for three positions (Mayor and two Council members), with a larger number of candidates in each race.

2. The district court's finding that use of staggered terms had discriminatory effect (J.A. 8a, 16a) is equally well founded. Mr. Rangel testified that its "spotlighting" effect (and consequent nullification of single-shot voting) was similar to that of numbered places (J.A. 54a-55a). Dr. Cottrell also explained the adverse spotlighting consequences of staggered terms (J.A. 44a-45a, 46a). But staggered terms do not simply mean that Lockhart's minority voters now face every year the same long odds they formerly confronted biannually.

Staggered terms have a distinct negative impact. By virtue of the increased frequency of elections, staggered terms tend to reduce voter turn-out, as Dr. Taebel testified (R. 99). And Dr. Frederick Cervantes testified that low voter turnout has its most severe consequences among minorities, particularly Mexican Americans. (J.A. 58a-59a) This phenomenon is illustrated by the 1975 Lockhart election, which had unusually low overall voter turnout (176 total voters). In that election, Mexican Americans comprised only 5.7% of the voters, compared to 19%-34% of the electorate in all other Council elections since 1973. (J.A. 77a) Thus, more frequent elections undermine the high level of minority voter participation which is necessary for minority candidates to have any chance of success.

C. Lockhart Failed To Carry The Legal Burden Imposed On It By Section 5.

Section 5 places on Appellant the burden of proving that Lockhart's election system is non-discriminatory in

both purpose and effect. 42 U.S.C. §1973c; Georgia v. United States, supra, 411 U.S. at 538; City of Rome v. United States, 446 U.S. 156, 172 (1980). On the question of whether a covered change is retrogressive, Beer v. United States, supra, the covered jurisdiction likewise has the burden of proof. The district court found not only that Appellant had failed to carry its burden, but that the evidence showed Lockhart's use of numbered places and staggered terms to be both discriminatory and retrogressive under Beer v. United States, supra. (J.S. App. 16a, Conclusions #12 and 13)

Appellant does not seriously dispute that its use of numbered posts and staggered terms has a dilutive effect on Lockhart's Mexican American voters, but urges that that effect is not retrogressive (Brief for Appellant at 15-19). 40/ Both Appellant and the government advocate a purely mechanical application of Beer which would limit the reviewing

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40/ The government takes Lockhart's side on this issue (Brief for the United States at 21).

authority (the Attorney General or the District Court for the District of Columbia) to simply comparing the incremental positive or negative effects of the election law change, without considering how discriminatory the underlying system may have been. The validity of such a mechanical approach is questionable in light of the legislative history of the 1982 amendments to the Voting Rights Act, Pub. L. 97-205 (June 29, 1982), in which Congress extended Section 5 for 25 years. The 1982 Senate Committee Report, supra, at 12 n. 31, clarifies the intended meaning of Section 5 in future cases as follows:

> Under the rule of Beer v. United States, 425 U.S. 130(1976), a voting change which is ameliorative is not objectionable unless the change "itself so discriminates on the basis of race or color as to violate the Constitution".... In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.
>
> In analyzing submissions, the Attorney General has correctly taken the position that the immediately preceding plan is not

> necessarily the standard against which to measure retrogression if that plan was precleared without the appropriate section 5 review... The same should also hold true if the prior plan was precleared under standards that no longer apply. [citations omitted]

That report is the most authoritative guide to the 1982 Voting Rights Act amendments. The Senate-passed bill, S. 1992, differed in several respects from the bill previously passed by the House, H.R. 3112. See 128 Cong. Rec. H 3841 (daily ed., June 23, 1982). The House accepted the Senate's version as a complete substitute, id., pp. 3839, 3846, and when signed by the President on June 29, 1982, the Senate bill became law.

The current extension of Section 5 therefore does not contemplate a narrow or rigid "before and after" test as the standard for all preclearance actions. It should, rather, be read in harmony the broader standard of the newly-amended Section 2, which adopts an "effects" test similar to that of

Section 5. [41] Under that amendment, a voting standard, practice or procedure may not be "applied...in a manner which results in a denial or abridgement of the right to vote." Pub.L. 97 - 205, Sec. 3, amending 42 U.S.C. § 1973. The amendment specifies the proper standard for applying Section 2: whether,

> based on the totality of circumstances,...the political processes leading to nomination or election are not equally open to participation by members of class of [minority] citizens...in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office... is one circumstance which may be con-

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41/ The Section 2 prohibition, the standards of which are carried into Section 5 preclearance actions by the legislative history, bars voting practices which carry forward the discriminatory effects of past practices, without necessarily exacerbating them. The present results of the practices are dispositive. See, e.g., H.R. No. 97 - 227, supra, at 28,31; S. Rep. No. 97-417, supra, at 28-29.

sidered... 42/ Under that standard, the totality of the election system's impact, and not merely the incremental impact of the changed features, must be examined. Cf. Wilkes County v. United States, 450 F. Supp. 1171, 1178 (D.D.C. 1978), aff'd 439 U.S. 999 (1978). This Court should apply that more flexible standard contemplated by the 1982 amendment. See, Bradley v. School Board of City of Richmond, 416 U.S. 696, 711-15 (1974); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 282-83 (1969).

This Court need not and should not now re-examine the correct application of Beer in light of the 1982 amendments, however. For the district court's finding of discrimination and retrogression stands on its own. That ultimate finding is a pure finding of fact which can-

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42/ The legislative history of this amendment shows that the existence of racially polarized voting and the use of "anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination" are among the factors typically indicating discriminatory effects in violation of Section 2. S. Rep. No. 97-417, supra, at 28-29.

not be overturned unless it is clearly erroneous, Fed. R. Civ. P. 52(a); Pullman-Standard v. Swint, 72 L.Ed. 2d 66, 79-80 (1982). The Court has very recently applied that principle to a voting rights case in which it upheld the ultimate finding of a district court that an at-large system reflected discriminatory intent, Rogers v. Lodge, ____ U.S.___, 50 LW 5041, 5043-5044 (July 1, 1982). The finding of retrogressive impact made below in this case has ample support in the record, see pp. 35-37, supra, and deserves similar deference. In this case, as in City of Rome v. United States, supra, 446 U.S. at 183-185, refusal to preclear the City's use of numbered posts and staggered terms, in the context of at-large elections and polarized voting, was not clearly erroneous. 43/

43/ Appellant's additional contention, that the district court's remedy exceeded the scope of the violation found (Brief for Appellant at 19-23), is unsubstantiated. Contrary to Appellant's claim, the court below did not invalidate Lockhart's entire form of government or Home Rule Charter. It merely denied preclearance of the election

CONCLUSION

The judgment of the district court should be affirmed.

July 16, 1982

Respectfully Submitted,

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system including numbered posts and staggered terms. See Brief for the United States, at 13-14 n. 7. The district court's judgment does not give occasion to address the third issue framed by Appellant.

Reply Brief for the United States

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No. 81-802

In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF LOCKHART, APPELLANT

v.

UNITED STATES OF AMERICA AND ALFRED CANO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

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UNITED STATES OF AMERICA AND ALFRED CANO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

After the United States filed its brief in this case, but before appellee Alfred Cano filed his, Congress passed and the President signed the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 *et seq.*, which amended portions of the Voting Rights Act of 1965, 42 U.S.C. (& Supp. IV) 1971 *et seq.* In his brief, appellee Cano (Br. 48-52) argues that an electoral change, to receive pre-clearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, must satisfy the "results" test of the newly amended Section 2 (96 Stat. 134),[1] in addition to being free

[1]Section 2 (42 U.S.C. 1973) now reads:

> Sec. 2.(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of

of discriminatory purpose and satisfying the retrogression standard of *Beer* v. *United States*, 425 U.S. 130 (1976). He contends further that the facts of this case establish a violation of amended Section 2, which provides an alternative ground for this Court to affirm the district court's judgment (Br. 48-52). The district court's bifurcated treatment of the Section 5 issues, however, precludes affirmance by this Court on the alternative ground suggested by appellee Cano. The district court's findings and conclusions pertain only to the issue of "retrogression;" there is no evidence in the record relating to any other issue. Moreover, the district court should be given the initial opportunity to determine whether Section 2 applies in this case and, if so, what impact the amended provision has on the outcome of the case.

The 1982 amendments make no changes in the existing preclearance standards in Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Thus, the specific issues presented to this Court in this appeal—whether the City of Lockhart's home rule election plan is a "standard, practice or procedure with respect to voting different from that in force or effect" on November 1, 1972, and whether that plan has a retrogressive effect on the voting rights of the City's

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the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Mexican-Americans—are unaffected by the new legislation. Therefore, the basic submission in our previous brief with regard to the proper resolution of these issues by this Court is unaffected by the 1982 Act.

Section 2 of the Act, 42 U.S.C. 1973, however, has been amended and it now prohibits any State from imposing or applying any voting standard, practice or procedure "which results" in denial or abridgement of the right to vote by any citizen "on account of race or color." The new Section 2 requires an analysis of the "totality of the circumstances" in order to determine whether the "result" of the plan would be to allow minorities "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Pub. L. No. 97-205, Section 3, 96 Stat. 134.

Appellee Cano, relying (Br. 49-50) upon a reference in the Senate Report of the new amendments,[2] argues that this Court in reviewing the City's plan in this Section 5 proceeding must now consider not only whether the effect of the City's change is "retrogressive" but also, if it is not, whether the new voting procedure itself so discriminates as to violate Section 2.

Under appellee Cano's interpretation, Congress has expanded Section 5 to include an assessment of not only the "purpose" and "effect," but also the "results" of all proposed voting changes—and has done so without making any change in the language of Section 5. In these circumstances, we caution against according controlling significance to the references in the legislative history cited by

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[2]S. Rep. No. 97-417, 97th Cong., 2d Sess. 12 n.31 (1982); see also 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Reps. Sensenbrenner and Edwards); 128 Cong. Rec. S7095 (daily ed. June 17, 1982) (remarks of Sen. Kennedy).

appellee Cano. Cf. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979); *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978). The Court in *Beer* v. *United States, supra,* construed the "effects" standard in Section 5 to mean only "retrogression." The 1982 amendments to the Voting Rights Act suggest no congressional intent to overrule *Beer*.[3] Whether in these circumstances the "results" standard of Section 2 can properly be imported into Section 5 presents a complex issue which can be decided only after a comprehensive assessment of the statutory scheme and legislative history. That inquiry should be performed in the first instance by the district court.

In any event, because the district court had occasion to examine only the "retrogressive" effect of the City's proposed change, there are no findings or conclusions that address whether the voting plan at issue is subject to or satisfies amended Section 2. We therefore disagree with appellee Cano's contention that this Court can apply the newly amended Section 2 in this case in the first instance.[4] If the Court agrees with the submission in our main brief that the City's plan is subject to the preclearance requirements of Section 5, and that the plan does not have an impermissible

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[3]We note, moreover, that incorporation of the Section 2 standards into Section 5 would shift the burden of proof to the covered jurisdiction submitting a voting change to demonstrate by the preponderance of the evidence that the proposed change does not "result" in a denial or abridgment of the right to vote on account of race. This shift adds another dimension deserving careful scrutiny of Congressional intent before too hastily deciding the proper relationship between Section 5 and amended Section 2.

[4]With regard to the applicability of the 1982 Act to pending litigation, the statute states that the amendments to Section 2 shall take effect immediately upon enactment. Pub. L. No. 97-205, Section 6, 96 Stat. 135. See *Hutto* v. *Finney*, 437 U.S. 678, 694 n.23 (1978); *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711-716 (1974); *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801).

retrogressive effect on minority voting rights, a remand to the district court will be required, for consideration of whether the electoral plan was adopted with a discriminatory purpose in violation of Section 5. On remand, the district court would have the opportunity to consider the Section 2 issue raised by appellee Cano. See *Pullman-Standard* v. *Swint*, No. 80-1190 (Apr. 27, 1982), slip op. 19; cf. *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969).

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

OCTOBER 1982

DOJ-1982-10

Docket Sheet

NO. 81-802-ATX	TITLE	City of Lockhart, Appellant v. United States and Alfred Cano

DOCKETED	COURT
Oct. 28, 1981	United States District Court for the District of Columbia

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellant: Douglas K. Spaulding
	Counsel for Appellees: Solicitor General, Joaquin G. Avila, Norman J. Chachkin, Morris J. B aller, Vilma S. Martinez
Oct. 28, 1981	Statement as to jurisdiction filed. (Record filed).
Nov. 27, 1981	Order extending time for the respondents to file a response to the petition until Dec. 30, 1981.
Dec. 31, 1981	Order extending time to file the Government's response to the petition until Jan. 13, 1982.
Dec. 30, 1981	Motion of Alfred Cano to to affirm filed.
Jan. 20, 1982	Memorandum for the U. S. filed.
Jan. 27, 1982	DISTRIBUTED. 2-19.
Feb. 9, 1982	Appellant's supplemental memorandum filed. (D).
Feb. 16, 1982	Appellee's supplemental memorandum filed. (D).
Feb. 23, 1982	REDISTRIBUTED. 2-26.
Mar. 1, 1982	JURISDICTION NOTED.

March 17, 1982	Order extending time to file the joint appendix and Appellant's brief on the merits until May 6, 1982.
Apr. 30, 1982	Order further extending time to file the joint appendix and Appellant's brief on the merits until May 17, 1982.
May 18, 1982	Joint appendix filed.
May 18, 1982	Brief for the appellant filed.
June 8, 1982	Order extending time for appellee Alfred Cano to file th brief on the merits until July 16, 1982.
June 16, 1982	Brief for appellee, United States filed.
July 16, 1982	Order further extending time for appellee Alfred Cano to file brief on the merits until July 20, 1982. (orally)
July 19, 1982	Brief for appellee Alfred Cano filed.
Aug. 25, 1982	CIRCULATED.
Sept. 28, 1982	Motion of the Solicitor General for divided argument filed.
Oct. 12, 1982	The motion of the Solicitor General for divided argument is DENIED.
Oct. 27, 1982	Reply brief for the United States filed. (D).
Nov. 3, 1982	ARGUED.